A
TREATISE ON THE LAW
OF
NATIONAL AND STATE BANKS
INCLUDING THE
CLEARING HOUSE AND TRUST COMPANIES
WITH AN
APPENDIX
CONTAINING THE
NATIONAL BANK ACT AS AMENDED
AND
INSTRUCTIONS RELATIVE
TO THE
ORGANIZATION OF NATIONAL BANKS

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ALBANY
J. B. LYON COMPANY, PRINTERS
1906

PREFACE.

The aim of the author in writing this book, has been to make it a treatise of special value and practical service to the Banker and Lawyer. With this object in view and to accomplish this end, the laws as found enacted in the statutes, and established by the courts are presented. From this authentic source, the banker, lawyer, and student may be able to obtain the information desired upon all questions arising in the organization, business and management of a bank.

Banking is a business which, by legislation, is placed under the control and regulation of law; and at the present time there are but few private banks in existence in the United States. The law in some of the States forbidding the privilege of banking to private persons. Therefore banks are now very largely incorporated associations, deriving their authority from the national banking laws enacted by Congress, and the laws enacted by the States.

All banks incorporated under the national banking laws derive their authority from the government of the United States, and are, therefore, called national banks. The national banking system originated as a financial measure in the early years of the Civil War. It was urged as a measure of currency reform, and also as a means of replenishing the United States treasury. Its prime object being to stimulate and improve the sale of government bonds, and to provide a national currency which would have a uniform value.

The Supreme Court of the United States in construing the purpose and object of national banks has judicially declared that "they are institutions designated to be used to aid the government in the administration of an important branch of the public service."

Banks which are incorporated under the State laws are designated and called State banks, deriving their power and authority from the laws enacted by the State.

All incorporated banks obtain their powers directly from the statute laws authorizing their creation. These powers or rights are denominated and called statutory or expressed powers. They have also inherent, incidental, and implied powers, such as are necessary to carry out and into effect the full purposes of the corporation.

The author has endeavored, in the treatment of the subject, to define these various powers, and laws, which control and regulate the business of banking. An earnest effort has been exerted to present the law and demonstrate what a banking corporation can, or cannot, do. With this object in view all the leading cases reported, involving the rights and powers of a bank, have been reviewed and considered; and when deemed expedient the opinion of the court, as rendered in the case, has been quoted in full. This plan has been adopted for the reason that an analysis of the cases or opinion of the court frequently fails to correctly express and record the law as rendered by the court. In other instances the law principle is simply and plainly stated, and supported by citation of cases rendered by the court. And as a result, the production of this work, which may rightfully be called *a ready reference or working book on banking.*

It is also designed and was originally intended to be a digest of the law and a work for the busy lawyer, to be used in the practice, determination, and settlement of questions arising and growing out of the business of banking and in the trial of bank cases.

The author has given unlimited time and care to the selection and compilation of cases directly in point, and the labor thus performed is labor saved to the busy practitioner.

All subjects and questions of importance relating to, and affecting banks and banking, are presented, including a chapter devoted to (each) The Clearing House and Trust Companies.

A chapter has also been added entitled Inspection and Examination of Banks. This chapter is a discussion in a general way of the procedure and mode required to be followed by the examiner in the examination and checking up a bank.

The appendix to the work contains all the laws of the Na-

tional Banking Act in force at the present time. In addition thereto complete and full instructions are given relative to the organization of national banks.

In conclusion this work is respectfully submitted upon its merits, with the hope that it may prove (itself) to be a correct guide to lawful and honest banking, and a text-book invaluable to the banker, lawyer, and student.

H. W. MAGEE.

PASADENA, CAL., *January* 2, 1906.

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CHAPTER I.

BANKING A CONSTITUTIONAL AND LEGISLATIVE PRIVILEGE.

§ 1. Right of banking controlled by legislation.

The right of banking was originally a common-law right. The privilege was without restriction and open to all. The privilege of private banking, however, has, by constitutional and legislative enactments passed by many of the States, been either prohibited or placed under control and regulation of law. The privilege of private banking, it is held by leading authorities, is one which the Constitution or Statute of a State may forbid. Some of the courts, however, question this doctrine and hold that the Legislature may make the issuing of notes a franchise; but as to the other branches of banking, they deny the right of a Legislature to interfere. The reasoning is based upon the constitutional grounds that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of law."

This question as early as 1818 was presented to the Supreme Court of Judicature of the State of New York in the case of the People v. Utica Insurance Co., 15 Johns. (N. Y.) 358. The action was an information in the nature of a quo warranto by the Attorney-General against the defendant for exercising banking privileges without authority from the Legislature, and was based upon an act of the Legislature commonly called the "Restraining Laws," which provided that "no person unauthorized by law shall subscribe to or become a member of any association or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks do or may transact by virtue of their respective acts of incorporation."

The court, in defining the right of private banking under this

Statute, says, "The right of banking, since the Restraining Act, is a privilege or immunity subsisting in the hands of citizens by grant of the Legislature. The exercise of the right of banking, then, with us, is the assertion of a grant from the Legislature to exercise that privilege, and consequently it is the usurpation of a franchise, unless it can be shown that the privilege had been granted by the Legislature."

The Legislature, by the above act, did not confine the restriction to the issuing of notes, but included the receiving of deposits, and the making of discounts, unlawful and prohibitive, unless the person conducting this branch of banking had the privilege or authority from the Legislature.

In the case of Nance v. Hemphill, 1 Ala. 551, the court in substance says: "Where the Constitution or Legislature does not prohibit private banking, it is a common-law privilege; and is a right that any individual may exercise until forbidden by the Legislature."

The Supreme Court of the State of North Dakota, in the case of the State of North Dakota ex rel. Marshall T. Goodsill v. Thomas Woodmansee, 1 N. Dak. 246, held that a legislative act which prohibits all persons from doing a banking business within the State, except corporations, which are organized under the law, is constitutional. The court says, "As a matter of fact, we have been unable to find an authority, and we have searched diligently, which has ever questioned the right of the Legislature in the exercise of police power to regulate, restrain, and govern the business of banking."

It is interesting to note the fact that the question is again brought before the Supreme Court of the State of South Dakota in the case of State v. Scougal, 3 S. Dak. 55. In this case the court holds that the Banking Act of the State, in so far as it prohibits an individual from carrying on the business of banking other than the issuing of notes, and circulating the same as money, is in conflict with the Constitution of the State, which reads as follows:

"No law shall be passed, granting to any citizen, class of citizens, or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

In the absence of a constitutional provision or inhibition, the

Constitution being silent on the subject, it remains a question whether the legislative body of the State has the right to deprive a citizen under the Fourteenth Amendment of the Constitution of the United States of the rights and privileges guaranteed to him by said constitutional provision.[1]

The business of banking in its very nature creates a confidential and trust relationship, which exists betwen the bank and its patrons; and the difficulties that depositors and those dealing with the bank necessarily encounter in detecting irregular practices, and in ascertaining the real financial conditions of the same, seem to be sufficient to justify inspection and control.[2]

The question has never been directly presented to the Supreme Court of the United States, and until it passes upon the same, which it must do when judicially brought before it, the States are left in control of the privilege; and the right or privilege of private banking being a franchise, which may be granted, governed, controlled, or prohibited either by constitutional or legislative provisions of a State, the power is vested in the State, and is denominated a police power; which may be exercised and imposed upon the theory that all private interests are made subservient to the general interests of the community, and in the interest of public safety.

The law seems to be settled that a State may, by constitutional enactment or legislative provisions, prohibit private banking within its domain, upon the principle "that the power of the States over police regulations is supreme." That this power is not restrained by the Constitution of the United States to the States, is the doctrine as enunciated and established by the Supreme Court of the United States in Slaughter-House Cases, 16 Wall. 36, and Bartemeyer v. Iowa, 18 Wall. 129.

The right of banking, therefore, in a State, being a privilege or business under the control of the State, it cannot be conducted where prohibited by the law of the State.

1 Attorney-General *v.* Utica Ins. Co., 15 Johns. (N. Y.) 357; Bank of Augusta *v.* Earls, 13 Pet. 519; Nance *v.* Hemphill, 1 Ala. 551; State *v.* Scougal, 3 S. Dak. 55; Du Quoin *v.* Kelley, 176 Ill. 218, 52 N. E. 919; Bank *v.* Henne, O. & L. Co., 105 Cal. 376; Way *v.* Butterworth, 106 Mass. 75.

2 People *v.* Brewster, 4 Wend. 498; Blaker *v.* Hood, 53 Kan. 499.

The United States, under the Constitution and the laws of Congress, is supreme in its authority to form a bank and conduct the same. It is supreme in its authority, "to coin money, regulate the value thereof and of foreign coin." It is also within the privilege of Congress to make gold and silver, or anything else it may designate as money, a legal tender.

The States are prohibited from this power, but they may form a bank and conduct the same and issue notes and circulate the same as money and manage the bank wholly in the interest of the State; but the States are prohibited from forming through constitutional conventions and indorsement thereof by the people, Constitutions empowering them to make notes or anything but gold and silver coined by the government of the United States a "legal tender."

The reasons for these prohibitive provisions, which were enacted and became a part of the Constitution of the United States, are historically and judicially stated in the case of Edwards v. Kearzy, 96 U. S. 595.

The Supreme Court, in explaining the reasons for the adoption of the constitutional provisions, says:

"The history of the National Constitution throws a strong light upon this subject. Between the close of the War of the Rebellion, and the adoption of that instrument, unprecedented pecuniary distress existed throughout the country.

The discontents and uneasiness, arising in a great measure from the embarrassment in which a great number of individuals are involved, continued to become more extensive. At length, two great parties were formed in every State, which were distinctly marked, and which pursued distinct objects with systematic arrangement. 5 Marshall L. of Wash. 75. One party sought to maintain the inviolability of contracts, the other to impair or destroy them.

The emission of paper money, the delay of legal proceedings, and the suspension of the collection of taxes, were the fruits of the rule of the latter, wherever they were completely dominant. 5 Marshall L. of Wash. 86.

The system called justice was, in some of the States, iniquity reduced to elementary principles. * * * In some of the States creditors were treated as outlaws. Bankrupts were armed with legal authority to be persecutors, and by the

shock of all confidence, society was shaken to its foundations. Fisher Ames Works (ed. of 1859), 120.

Evidences of acknowledged claims on the public would not command in the market more than one-fifth of their nominal value. The bonds of solvent men, payable at no distant day, could not be negotiated but at a discount of 30, 40, or 50 per cent. per annum. Landed property would rarely command any price; and sales of the most common articles for ready money could be made only at enormous and ruinous depreciation.

"State Legislatures, in too many instances, yielded to the necessities of their constituents, and passed laws by which creditors were compelled to wait for the payment of their just demands on the tender of security, or to take property at a valuation, or paper money falsely purporting to be the representative of specie. Ramsey Hist. U. S. 77.

"The effects of these laws interfering between debtors and creditors were extensive. They destroyed public credit and confidence between man and man, injured the morals of the people, and in many instances insured and aggravated the ruin of the unfortunate debtors for whose temporary relief they were brought forward. 2 Ramsey Hist. S. C. 429.

"Besides the large issues of Continental money, nearly all the States issued their own bills of credit. In many instances the amount was very large. 2 Phillip's Hist. Sketches of Am. Paper Currency, 29.

"The depreciation of both became enormous. Only one per cent. of the Continental money was assumed by the new government. Nothing more was ever paid upon it. Act of Aug. 4, 1790, § 4, 1 Stat. at L. 140; 2 Phillips' Hist. Amer. Paper Currency, 194. It is needless to trace the history of the emissions by the State.

"The Treaty of Peace by Great Britain declared that the creditors on either side shall meet with no lawful impediment to the recovery of the full amount in sterling money of all bona fide debts heretofore contracted. The British Minister complained earnestly to the American Secretary of State of violation of this guaranty. Twenty-two instances of laws in conflict with it in different States were specifically named. 1 Am. St. Papers, 195, 196, 199, and 237. In South Carolina, laws were passed in which property of every kind was made

legal tender in payment of debts, although payable according to contract in gold and silver. Other laws installed the debt, so that of sums already due only a third and afterward only a fifth, were securable in law. 2 Ramsey Hist. S. C. 429. Many other States passed laws of similar character. The obligation of the contract was as often invaded after judgment as before. The attacks were quite as common and effective in one way as in the other. To meet the evils in their various phases, the National Constitution declared that '*No State should emit bills of credit, make anything but gold and silver coin a legal tender in payment of debts, or pass any law, * * * impairing the obligations of contracts.*' All these provisions grew out of previous abuses. 2 Curt. Hist. of Const. 366. See also the 'Federalist,' Nos. 7 and 44. In the number last mentioned, Mr. Madison said that such laws were not only forbidden by the Constitution, but were contrary to the first principles of the social compact and to every principle of sound legislation.

"The treatment of the malady was severe, but the cure was complete. No sooner did the new government begin its auspicious course than order seemed to arise out of confusion. Commerce and industry awoke and were cheerful at their labors, for credit and confidence awoke with them. Everywhere was the appearance of prosperity, and the only fear was that its progress was too rapid to consist with the purity and simplicity of ancient manners. Fisher Ames' Works, supra, 122.

"Public credit was reanimated. The owners of property and holders of money freely parted with both, well knowing that no future law could impair the obligation of the contract. 2 Ramsey Hist., supra, 433."

We find, then, the supreme right of banking, the coining of money and regulating the value thereof, to be vested in the Constitution of the United States; but the Constitution does not prohibit the States which form the Union and nation from creating or authorizing banks, but only prohibits them from making bank notes, or anything but gold and silver coined by the government of the United States, a legal tender.

The right of banking, then, exclusive of coining money, and regulating its value in a State can be governed by the State. It then becomes a privilege or franchise whereby a person

or individuals may be authorized by law to conduct the business of banking.

When banks are duly authorized and incorporated according to the provisions of law, they become private corporations. A national bank, organized under the National Banking Act, is a private corporation.

The right of banking within the State being vested in the Constitution and legislative power of the State, and the privilege being conceded to be a franchise granted by the law, or by special enactment of the Legislature, and one which may be controlled and regulated under the police powers of the States, private banking may be therefore prohibited by constitutional or statutory enactments.

Banking institutions must, where such constitutional or legislative inhibitions exists, before beginning the business of banking, incorporate as the law of the State may require, following the provisions laid down in the formation of such corporations; and when duly incorporated, having complied with the special banking law in force in the State where such laws are enacted, they then become lawful institutions and have the right of banking.

CHAPTER II.

STATE REGULATION OF BANKING AFTER ORGANIZATION.

§ 2. State has power to regulate the business.

The State has the power to regulate the business of banking conducted by all banks organized within the State, and of foreign banking corporations doing business within the State, but a State has no power to define the authority or regulate the business of a national bank. This power is vested in and exercised by Congress alone. But it is held in the case of Hoke v. People, 122 Ill. 511, that a State court has jurisdiction over a national bank clerk for forgery, notwithstanding he was punishable for the same act under the Revised Statutes of the United States, section 5209.

A State may prescribe restrictions upon State banks which are incorporated under a general or special law, but cannot take away any power or privilege granted to them by a general law.

The State may place a limitation upon the amount of indebtedness which a bank may incur, providing that it shall not create an indebtedness in an amount to exceed its capital stock subscribed or paid up.[1]

The fact that debts so created does not render void notes and mortgages securing them.[2]

It may also prohibit the taking of or loaning money upon certain securities such as mining stocks, and may prescribe reasonable regulations as to the investment of its deposits.[3]

It may also provide that a certain per cent. of its net earnings, after all expenses and losses are deducted for the current year, shall be placed as a reserve fund.

And the law may provide how this fund may be turned into capital stock of the bank, thereby increasing and enlarging the capital.

It may also limit the amount of indebtedness of any one person, firm, or corporation to the bank.

1 C. C. California, 309.

2 Underhill v. Santa Barbara, 93 Cal. 300.

3 9 Cush. (Mass.) 604.

And may also prohibit certain persons, its officers, or directors, from becoming indebted to the bank in any sum where they act in the capacity as trustees.

It may also prohibit the depositing of public funds in a bank, and make such an act a penal offense against a bank for taking the same.

It may also require that reports shall be published showing all deposits which are uncalled for and have been held for a certain period, and a failure to comply with such requirements may be made an offense punishable by fine and imprisonment.[4]

The State may also provide that a public commissioner, or a board of bank commissioners shall be appointed, whose duties shall be to examine into the affairs of banks. They may be given full power and authority to take possession of banks, where found insolvent.

National banks are regulated, as stated, by the law authorizing them, and Congress alone can place restrictions or limitations upon their business.

It has been held that where Congress has made an act a crime and punishable, a State does not lose its right to punish the offending party also.[5]

The State may impose and levy a license tax upon incorporated State banks and prohibit a bank from doing business unless such tax is paid. But such a license tax to be constitutional must apply to all corporations.

The power of the State in regulating the business of all corporations is supreme, and it may place such restrictions and limitations upon each class as may be in the interest of the State and the public generally who may deal with the corporation, but all such inhibitions and restrictions must be within the scope of legislative power.

A State may prescribe the terms and conditions upon which a foreign bank or corporation can do business in the State by prescribing that it shall perform certain things before beginning business, and shall not be allowed to conduct business on any more favorable terms than a corporation incorporated in the State.

4 Eagle Ins. Co. *v.* Ohio, 153 U. S. 446; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574; Attorney-General *v.* North America Life Ins. Co., 82 N. Y. 172; Chicago Life Ins. Co. *v.* Auditor, 101 Ill. 82; Ward *v.* Farwell, 97 Ill. 593.

5 13 N. E. 823.

When the Constitution or the statute of a State requires that a corporation shall have and maintain an office or place in the State for the transaction of its business, where transfers of stock shall be made, and in which shall be kept, for inspection by every person having an interest therein, books in which shall be recorded the amount of capital stock subscribed and by whom, together with the names of the owners of stock, and the amount owned by them respectively, the amount of stock paid in, and by whom, the transfer of stock, the amount of its assets and liabilities, and the names and places of residence of its officers, mandamus proceedings will lie against the officer having custody of the books to enforce the right.[6]

The officers of a national bank cannot be compelled to exhibit the books of the bank to State officers for the purpose of furnishing a basis for a State taxation of the deposits, as against the depositors. But it is held that a State court has power to issue compulsory process against a national bank, compelling it to disclose the names of its depositors, and the amount of their deposits, in order to ascertain whether any money deposited therein, subject to taxation within the county, has not been returned for that purpose by the owners.[7]

The proceedings in such a case cannot, where instituted by a State court, be stayed by a writ of injunction issued by a Federal court.[8]

Section 3177 of the Revised Statutes of the United States gives authority to any collector, deputy, or inspector of internal revenue, to enter in the daytime any building or place within his district where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles; and any owner who refuses to admit such officer or suffer him to examine such article or object shall, for every such refusal, forfeit the sum of $500.

Held: That under this provision paid bank checks, which were duly stamped at the time they were made, are not such articles or objects subject to taxation, and that the bank may lawfully refuse the collector to examine the checks.[9]

6 Winter v. Baldwin, 89 Ala. 483.

7 First Nat. Bank of Youngstown v. Hughes et al., 6 Fed. Rep. 737.

8 First Nat. Bank of Youngstown v. Hughes et al., 6 Fed. Rep. 737.

9 United States, plaintiff in error, v. Mann, 95 U. S. 580.

The statute may define who have the right to examine, or inspect certain books of the corporation, and where language is used that "every person having an interest therein," etc., shall have such a privilege, it may be construed to be a depositor or creditor.

The privilege is denied to such, however, unless the statute expressly provides that they may do so.

No book, journal, or document can be made the subject of examination by a depositor or creditor, unless the authority is expressly provided for in the statute or authorized by order of a court of competent jurisdiction.

A creditor is one who has a lawful claim against the bank. The claim may be one which the bank disputes and refuses to recognize; and when disputed and invalid, the bank may refuse access to its books for the purpose of examination; and where there is no penalty or measure of damages fixed by the law against the bank, for a refusal to allow depositors and creditors the right to inspect any such books of the corporation, the bank can be held for only the actual damage arising from such refusal. A violation of any national or State law can be inquired into only through an action brought by the Comptroller of the Currency or the Attorney-General of the State.

CHAPTER III.

BANKING WITHOUT AUTHORITY.

§ 3. Unauthorized banking.

The business of banking, or the privilege, being one which is withheld or granted by the legislative power of a State, all persons being prohibited unless the privilege is first obtained, the act of banking when conducted without obtaining this right is termed unauthorized banking.

A private banker, being one who conducts the business of banking without first securing such a right, where the law requires that such a privilege must be obtained from the power authorized to grant the same, is conducting an unlawful business; and is subject to punishment as in such cases made and provided. Advertising that deposits will be received and checks paid implies the business or act of banking.

A corporation, organized to conduct a business of constructing and operating railroads, buying and selling real estate, dry goods, and the like, if it conducts the business of receiving money on deposit for others, and repaying the same upon orders or checks, is conducting the business of banking unlawfully.

The law of a State may permit the formation of a partnership, and authorize the partnership to conduct the business of buying and selling property, both personal and real, and (discount notes and other securities which is a part of the authorized business of banks) such a business may not be unauthorized banking as construed by the law of said State. Where the partnership is formed, the receiving of money and holding the same for others and paying checks is an act of banking.

Again, a Building and Loan Association which, in its general working and in its nature, is very similar to banking, may conduct the business of trusts, holding money placed in trust with it, either by individuals, corporations, or courts; but it has no authority to conduct the business of banking where the act or law authorizing its creation does not grant it the power to do

any business other than that for which it is specifically incorporated; and if it conducts the business of banking, receiving money on deposit, discounting notes, and securities, and loaning money to its customers on commercial paper, or otherwise, it is conducting an unlawful banking business.

§ 4. A de facto corporation.

A de facto corporation is one acting as a corporation in good faith.[1]

A corporation de facto exists where a number of persons have organized and are acting in good faith as a corporation.[2]

A bank may act as a de facto corporation, and while acting as such in good faith without authority of law, its acts are lawful and cannot be inquired into excepting through the proper authorities of the State.

All acts or business done by such corporation are not illegal, and its right to exercise corporate powers while performed in good faith, the bank claiming that it has the right to act, will be enforced as against all parties dealing with it.

It is also held that one who borrows money from such a corporation cannot defeat a recovery by alleging that the company is not a corporation.[3]

One who has contracted with such a corporation, and received the benefits of its performance, cannot defeat an action brought by the corporation by alleging its lack of power to contract or its want of legal existence.[4]

A bank that acts as a corporation, and is not such, with the knowledge of the fact, but induces another by fraud to deal with it, that other is not estopped from denying the existence of the corporation.

§ 5. Ultra vires acts.

An ultra vires act is the doing of a thing by the corporation which it has no power to do. It is also the doing of a thing which the charter or law says the corporation shall not do. A banking corporation may, in the first instance, believe that it has the power; and in the second, do a thing forbidden it by

1 Lakeside Ditch Co. *v.* Crane, 80 Cal. 181.

2 Martin *v.* Deitz, 102 Cal. 55, 41 Am. St. Rep. 151.

3 Grangers Business Asso. *v.* Clark, 67 Cal. 634.

4 Myer *v.* Bishop, 129 Cal. 204.

its charter or the law, knowing that it did not have the power. The latter act is forbidden by Statute, and is illegal.

An illegal act cannot be enforced. It is doing, or attempting to do, something the law says cannot be done. This act should not be called an ultra vires act. It is a violation of an expressed law.

The court in Central Trans. Co. v. Pullman Palace Car Co., 139 U. S. 24, says:

"The view which the court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal practice, is as follows: A contract of a corporation which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right or action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence, or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract can be estopped, by assenting to it, or by acting upon it to show that it was prohibited by those laws.

"The doctrine of the common law by which a tenant of real estate is estopped to deny his landlord's title has never been considered by this court as applicable to leases by realty corporations for their roads and franchises. It certainly has no bearing upon the question, whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other proper transfer, the inalienable franchise of the plaintiff,

is unlawful and void for want of legal capacity in the plaintiff to make it.

"A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on the implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The courts hold, that where a contract is not purely ultra vires, it may be enforced. For example, where, by a failure to enforce it, a legal wrong might be perpetrated.

In the case of Whitney Arms Co. v. Barlow et al, 63 N. Y. 62, the court says:

"The doctrine of ultra vires, whether invoked for or against a corporation, is not favorable in the law. It should never be applied where it will defeat the ends of justice."

The court further says:

"It is now very well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds e converso. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation."

In the case of McCormick v. Market National Bank, 165 U. S. 538-549, the court says:

"The doctrine of ultra vires by which a contract made by a corporation beyond the scope of its corporate powers, is unlaw-

ful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stock holders not to be subjected to risks which they have never undertaken; and above all, the interests of the public that the corporation shall not transcend the powers conferred upon it by law."[5]

This question is further discussed in the case of California Bank v. Kennedy, 167 U. S. 362; the direct question at issue in this case being whether a national bank could take and hold the stock of another corporation. The court in discussing the question says:

"In view of the fact that the defendant was a national bank deriving its powers from the statutes of the United States, the averment of a particular transaction of the one in question if entered into was without authority of law and cannot in reason be construed only to relate to the law controlling and governing the conduct of the corporation, that is, the law of the United States."

In this case it was admitted at the trial that the stock of the Savings Bank was not taken as security, or anything of the kind, and it is not disputed in the argument at bar, that the transaction by which this stock was placed in the name of the bank, was one not in the course of the business of banking for which the bank was organized.

The court says:

"Whenever divergence of opinion might arise on this question from conflicting adjudications in some of the State courts, in this court it is settled in favor of the right of the corporation to plead its want of power. That is to say, to assert the annulity of an act which is an ultra vires act."

In the case of Central Transportation Company v. Pullman Palace Car Co., 139 U. S. 24, the court says:

"A contract of a corporation which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond

[5] Concord First Nat. Bank v. Hawkins, 157 Mass. 548; Prescott Nat. Bank v. Butler, 98 U. S. 621; Hennessy v. City of St. Paul, 54 Minn. 219.

the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

The rule is well established that where a contract is made by a corporation beyond the scope of its corporate powers, it is unlawful and void.

Unlawful banking, then, is the conducting of the business of banking by a person, or combination of persons, who have not obtained authority where the law requires that such authority must first be obtained.

Unlawful banking may also be the conducting of the business of by a pretended corporation; one which, at the time of entering into transactions and contracts, well knew that it had no power or authority to act.

Unlawful banking may also be acts performed by duly incorporated corporations, which acts are either specifically denied the corporation by the charter, or forbidden by the law.

CHAPTER IV.

BANKS CLASSIFIED AND DEFINED.

§ 6. Commercial and savings banks.

Banks are classified into two divisions, namely, Commercial and Savings Banks. Commercial banks may be divided into three classes, for example, a bank may be incorporated solely for the purpose of receiving money on deposit, retaining the deposit for the depositor and repaying the same back to him upon demand. The business of this kind of a bank is commercial in character, and is called a bank of deposit.

Again, a bank may be incorporated to receive money on deposit, and repay the same to the depositor upon demand, and also to discount notes, securities and the like for its customers, and others. The business of this bank is also commercial in its nature, and may be called a bank of deposit and discount.

Again, a bank may be incorporated to receive money on deposit, and repay the same to the depositor upon demand, and to issue notes and circulate the same as money, and to loan money, discount notes, securities and the like. The business of this kind of a bank is also commercial, and is called a bank of circulation, deposit, and discount.

A commercial bank may therefore have any one or all of these elements and powers; and when endowed with any one of them, it is termed a commercial bank.

Banks are again divided into savings banks. Coming under this head there are only two classes; one is called Mutual Savings, which is an institution incorporated without capital stock, and is purely mutual in its nature and its powers, conducting business only for its members, and wholly in their interest. While the other is a savings bank incorporated with a capital stock, and is authorized to receive deposits and repay the same to depositors, loan money, and by special power granted by Statute in some of the States, is authorized to discount notes and issue certificates of deposit. This kind of a

bank, although denominated as a savings bank, is stripped of all the elements of such institutions.

National banks are commercial in character. They are institutions authorized directly by the Government of the United States, and are empowered to conduct a banking business, and to issue, under direction of the Government, their notes, and circulate the same as money. Their powers are strictly commercial.

§ 7. General definition of banking.

A banker as defined by a leading authority, "is one who conducts the business of banking, keeps an establishment for the deposit of money, bills of exchange, etc."

This definition may be enlarged upon, but cannot well be improved. A definition which defines a banker to be one who conducts the business of banking is general in its application.

The legitimate business of banking demands that a banker shall have a place of business; while a broker, one who buys and sells securities, etc., may not have a place of business, but may, and frequently does, conduct the business of a banker, without having a place of business.

§ 8. When a broker becomes a banker.

A broker becomes a banker subject to taxation, under the revenue law of the United States, when he, as an agent, receives from another for sale or discount bonds, bullion, stocks, bills of exchange, or promissory notes, where he employs capital of his own, with that of another, provided he has a place of business where credits are opened for that purpose.[1]

The court, in the case of Warren v. Shook, says:

"Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of banking." The court also gives the following illustration: "Thus, if A. B. has $10,000, which he desires to invest, and purchases U. S. stocks, or State stocks, or any other security, he does not thereby become a broker." "It is only when making sales and purchases in his business, his trade, his profession, his means of getting a living, or of making

1 Warren *v.* Shook, 91 U. S. 704; Selden *v.* Equitable Trust Co., 94 U. S. 419.

his fortune, that he becomes a broker, within the meaning of the Statute."

The court, in the case of Selden v. Equitable Trust Co., says:

"The Statute describes three classes of artificial and of natural persons, distinguished by the nature of the business transacted by them, and declares that individuals embraced in either of the classes shall be considered bankers. The first class is composed of those who have a place of business where credits are opened by the deposit or collection of money, or currency, subject to be paid or remitted upon draft, check or order. It is not claimed that the company engaged in that branch of business or that they are included in this first class. The agreed state of facts expressly repels any such claim.

"The second class are those who have a place of business where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes. It is contended on behalf of the plaintiff in error that the company is included in this class because it advances or loans money on bonds. The case, however, states that all the loans the company makes are investments of its own capital in mortgage securities on real estate. It is true, the bonds of the borrowers are taken with the mortgages, but the bonds are mere evidence of the debt. The money is advanced or loaned on the security of the real estate mortgage, and not on the security of the bond. We think Congress, in the cause of the Act we are now considering, intended reference to transactions entirely different from loans or advances made on the personal promise or undertaking of the borrower. The words used are not technical. They are, therefore, to be understood in their common and popular sense. Dwarris, Stat. 573. And that in common understanding, an advance or loan of money on stocks, bonds, bullion, bills of exchange, or promissory notes, is an advance or loan where those species of property are pledged as collaterals, or are hypothecated to secure the return of the advance, or the payment of the sum lent, is unquestionably true. It can be nothing else where the money is advanced or lent on stocks or bullion; and, by the Statute, bonds, bills of exchange and promissory notes are placed in the same catalogue with stocks and bullion.

All of them are like the subject on which the advance or loan is made. It is a fair presumption, therefore, that Congress regarded an advance or loan on bonds as similar in its character to an advance or loan on stocks, involving in each case an hypothecation of the subject on which the advance is made. If not so, if it was intended to embrace loans generally, there was no necessity for introducing the qualifying words, 'on bonds, bills of exchange, or promissory notes.'

"It was, however, not the lending, but the method or mode of operation, which was in view. If it was mere lending, Congress had in contemplation, it is difficult to conceive of a reason why mortgages of real estate were not included with stocks, bonds, bullion, etc. But it is a well known common usage for banks to make advances or loans on the hypothecation or pledge of such property, though not upon the hypothecation or mortgage of real estate. There was a reason, therefore, for omitting real estate from the catalogue of things upon which the advances or loans contemplated might be made. Advances on them are not within the ordinary business of a banker. To us, therefore, it appears plain, that it is the business of advancing or lending in the mode usual with bankers, that is, on collaterals, or on the pledge of personal property, that, by the statute, is defined to be banking within the intention of Congress, and that lending upon mortgages of real estate is not intended.

"The third class described by the statute comprises those who have a place of business where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale. The language is not 'where stocks, bonds, etc., are sold' or 'are held for sale.'

"Surely Congress did not intend that corporation or persons who have a place of business where they sell their stocks, bonds, bullion, bills or notes should be regarded as bankers. If they did, a vast proportion of the corporations and of the merchants and manufacturers of the country would be included. But the language of the statute is: 'Where' such property is 'received for discount or for sale.' The use of the word 'received' is significant. In no proper sense can it be understood that one receives his own stocks and bonds, or bills or notes for discount or for sale. He receives the bonds, bills,

or notes belonging to him, as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker; and when a customer brings bonds, bullion, or stocks for sale, and they are received for the purpose for which they are bought, that is, to be sold, the case is presented which we think was contemplated by the Statute. In common understanding, he who receives goods for sale is one who receives them as an agent for the principal and is the owner. He is not one who buys and sells on his own account."

Again, the Supreme Court, in the case of Richmond, Plaintiff in Error v. Blake, Collector of Internal Revenue, 132 U. S. 592, lays down the law to be that:

"Where a broker employs his own capital with the capital of others for the purpose of purchasing and selling stocks, bonds, bills of exchange, or promissory notes, he is a banker under the revenue law. But where he negotiates the sale of such securities for others, receiving therefor only a commission, he does not become a banker within the meaning or construction of sections 3407 and 3408 of the Revised Statutes of the United States."

§ 9. Broker and banker distinguished.

The business of a broker is distinguished from that of a banker in this: A broker buys and sells stocks and securities for others on commission, while a banker buys and sells securities by investing his own means, and the capital of others for a profit to the bank. It is not generally considered a part of the business of a bank, to conduct a brokerage business for others on commission. The National Banking Law expressly prohibits this power to National banks, and declares it to be unlawful for a National bank to take money, or the capital of others, and invest the same for them, either on a commission, or otherwise. It is the business of a National bank to make investments of its own funds, but not to invest for others.

The Supreme Court of the United States, in the case of Warren v. Shook, 91 U. S. 704, very clearly distinguishes the business of a banker and broker.

§ 10. Bank further defined.

The definition of a banker as given by Gilbert is, " a dealer in capital, or, more properly, a dealer in money. He is an intermediate party between the borrower and the lender."

This definition applies more directly to a broker who acts in the intermediate capacity between the parties. He may, and usually does, act for both parties. A banker who receives money on deposit for the purpose of re-loaning the same is not an agent for the depositor. He is the agent of the bank. He acts only for the bank, and never consults the depositor as to the character of security or class of loans that the bank may invest in, or hold. The law may define the kind of investments or securities which the bank may take, but the depositor has nothing to say.

§ 11. Private banker defined.

A private banker is one who conducts the business of banking without incorporation, and without any special privilege or authority of law.[2]

A private banker may, when not prohibited by law, conduct the business of banking, and may make such lawful contracts with his dealers in relation thereto, as to receiving and the repayment of money, as may be mutually agreed upon between the parties.

A private banker, then, is one who conducts the business of banking without incorporation, or a fixed capital stock invested; which is by law required of all duly incorporated banks, excepting mutual savings banks which, under the law as enacted by some of the States, may become incorporations for the purpose of doing a savings bank business, without capital stock.

§ 12. Trust companies defined.

A trust company may conduct the business of banking when not prohibited by law, without the use of the word " bank " incorporated in its charter. The name of a corporation, which may indicate its business, does not always express its powers or authority. A trust company formed and duly incorporated under an act of the Legislature providing for the incorporation

[2] Perkins *v.* Smith, 116 N. Y. 441; People *v.* Doty, 80 N. Y. 225.

and administration of trusts and of trust funds only and which defines its powers to be the receiving and administering of trust funds, is not a bank, and its manager cannot be termed a banker.

This subject is enlarged upon, and further discussed under a subsequent chapter treating upon trust companies. See section 47.

§ 13. Clearing house defined.

A clearing house is a voluntary association of banks for the purpose of making exchanges of notes, checks, bills, and moneys and settlements between the banks, all of whom must belong to the association.

In the case of O'Brien v. Grant, 146 N. Y. 163, 166, the business of the clearing house is defined to be "the effecting, at one place, of the daily exchanges between the several associated banks, and the payment at the same place of balances resulting from such exchanges."

A clearing house is not a bank used for the purpose of receiving moneys or other securities on deposit. Neither does it do a discount business. Therefore, it is not a bank. It may be an incorporated body composed of banks where such banks may become stockholders, but is usually an association of bankers for the purpose of making exchanges. A clearing-house is not subject to taxation under the revenue laws. Neither is it subject to examination by National or State examiners.

The powers and limitations of a clearing-house are treated at length in a subsequent chapter on clearing-houses. See section 46.

§ 14. Commercial bank further defined.

The definition of a banker conducting a commercial banking business is properly defined to be, "one who conducts the business of banking, who has a place or keeps a place or room for receiving money on deposit, and repaying the same out again to his depositors." He may buy and sell (when not prohibited by special acts of law) stocks, bonds, bills, promissory notes, checks, evidences of indebtedness, bullion, and bills of exchange for the accommodation of his customers, and for

profit to the bank. He may invest his own, and the money of his customers, in any way not prohibited by law. He has, however, no authority to issue notes of the bank to be used, circulated, or passed as money, unless the law, by constitutional and legislative enactment, expressly authorizes the privilege. He may act as an agent for his customers and depositors in the transaction of any and all classes of business, when not specifically prohibited by law from so doing. It will be seen, therefore, that the business of a commercial banker, or, in other words, the definition of a banker of this class, may be extended to any length.

§ 15. Mutual savings bank defined.

A mutual savings bank, as its name implies, is mutual in character and principle. It is an institution authorized by law, either by special enactment of the Legislature (where permitted by the Constitution) or under the general laws of the State.

It is not endowed with any of the commercial powers of a bank; and while called a bank, its business comes more strictly within the duties and powers of a trust or trustee. It receives the money of its members, and loans the same only for their benefit. The general definition of a bank does not apply to a mutual savings corporation. A mutual savings bank, if it may be called a bank, is a place where money is received, invested for, and paid out to, its members. The officers of such an institution act strictly in the capacity of trustees. It certainly does not come within the definition which defines a banker to be "a money changer" or "one who traffics in money, bills of exchange, etc."

§ 16. Capitalized savings banks defined.

There is considerable difference between a capitalized savings bank and a mutual savings bank. The one is incorporated with a capital stock, while the other has no capital stock. In the one, the principal object is to engage the capital for profit to the stockholder. In a capitalized savings bank, the depositor has no mutual interest with the stockholder. This kind of an institution has but few, if any, of the elements of a mutual savings bank.

A corporation formed with a capital stock to conduct a banking business, may designate itself as a savings bank; and

it may be declared to be such by the law and the courts. But the fact that it has a capital stock, and that its business is principally, if not wholly, to earn dividends for its stockholders and the owners of said capital stock, its business and all of its acts demonstrate that it is commercial in its nature, lacking all the elements of a mutual savings bank.

§ 17. National banks further defined.

A national bank, as has been stated, is an incorporated institution organized under the law enacted by the Congress of the United States, authorizing certain persons to carry on the business of banking.

The general definition, that a banker is "one who conducts the business of banking," applies to a national bank; but the powers granted in the conduct of a national bank, by reason of certain limitations placed upon it and specifically enacted in the law which prohibits certain privileges allowed to State banks, confine the business of banking under the national system strictly to the law enacted for their government and management.

The powers and limitations governing a national bank are very clearly defined by the National Bank Act; and the agents and managers of a national bank are held closely to the enforcement of the law governing them.

While a national bank is clearly commercial in its character, business, and powers, it is yet, nevertheless, estopped from conducting certain kinds of commercial transactions which are deemed dangerous for such institutions. For example, the statute fixing the powers of national banks specifically prohibits a national bank from holding real estate as security for a debt, unless such debt has been previously contracted in good faith.

A national bank is also prohibited from negotiating loans for its own customers; and by implied limitation cannot buy and sell stocks, or realty bonds on commission. All of these privileges are commercial transactions, which may be carried on by commercial State banks without restriction, and unless a special statute intervenes.

It will be seen, therefore, that a national bank, which is endowed with commercial powers, is restrained by law from

doing certain things which are purely commercial in their nature, and which may be done by commercial State banks.

§ 18. Enlarged and specific definition under State authority.

A bank, when incorporated under the general laws of the State, is, as stated, a private corporation; organized and to be operated for profit to its stockholders. It is subject, in its privileges and powers as to issuing and circulating its notes as money, to the laws of the United States, as enacted by Congress, and the laws of the State in which it conducts its business. A bank may be one of deposit where persons may simply deposit their money for safe-keeping, and one where the funds may be kept separate, or all be intermingled, and paid out upon demand by the depositor. A bank may be one of discount, where persons may place their notes for sale and discount, the profit going to the banker. The Supreme Court of the United States has decided that "the discounting of notes by a person, or corporation, for profit, where the customer's funds are used, is conducting the business of banking."

Commercial banks more clearly defined.

A bank, in a commercial sense, has authority, under State law, to receive deposits, make discounts, and circulate its own notes as money, where no inhibition is enacted by the Constitution or law of the State. Such institutions are clothed with power to transact a commercial banking business. The issuing of notes and circulating the same as money is not, however, a necessary element in the full and complete exercise of commercial banking. A bank incorporated under State authority to conduct a commercial banking business has power to carry into execution and exercise all commercial transactions necessary in the conduct of its business. It has power to receive money on deposit from persons, municipalities and corporations (where not especially prohibited by State legislation), and repay the same to its depositors upon such terms, and at such times, as may be lawfully agreed upon. It has the right to receive general and special deposits. It has the right to discount notes; to make loans on personal and real estate security, under regulation of law; to discount foreign and domestic bills of exchange; and to transact any and all other business coming under the commercial class, and authorized

by law. Its business is called commercial, as it is the medium through which the exchange of merchandise is transacted. It acts as the beneficiary for the commerce of the world. It holds intercourse with all business transactions, either directly or indirectly, and becomes, and is, indispensable in the transactions of business. It holds a confidential relationship with all customers dealing with it; and the bank has the right to protect this relationship against all persons, and cannot be compelled to disclose this right, except by order of a court of competent jurisdiction.

Commercial banks are the active agents of all parties who may do business with them, and as such their interests are mutual, and in the conduct of the business they are governed by law, and are therefore possessed with all lawful, expressed, implied, and incidental powers necessary to carry into execution their business and purposes.

§ 19. Mutual and capitalized savings banks more clearly distinguished.

A savings bank may be mutual, or an institution organized with capital stock. Mutual savings banks originally were organized as eleemosynary institutions in character, while mutual in principle; their purpose being to stimulate and fix the habit of saving with the poor. They were fiduciary agents, acting for those with limited means, which could not be easily invested; but when an accumulation of a sufficient fund was obtained, loans could be made and all depositors became interested in the profits.

They are mutual in principle, as all the loans are made in the interest of the members or depositors, from whom the money is obtained. In case of loss, the bank having no capital stock, which may be assessed to cover the same, or other property out of which it may be paid, the loss can be apportioned *pro rata* among the members.

It having no capital stock, its management must be conducted wholly in the interest of the members. It is merely an incorporated institution, organized for the purpose of receiving money of its customers or members on deposit, and investing the same for them, and repaying the same upon such terms and agreements as may be lawfully entered into between

themselves. No profits can be made upon the funds except they enure to the benefit of the members. After the necessary expenses are paid for its management, as stated, all the profits, at fixed periods, belong to the members, and must be ratably divided between them.

The distinction between a mutual savings bank, namely, one without capital stock, and a savings bank incorporated with capital stock, is, that in the one the members receive all the profits, less the actual expense required in managing the same, and are liable for all the losses *pro rata* among the members; while in the other, the depositors receive a stipulated dividend (that the directors may agree with the depositors as to interests or dividends, is fully conceded), and are relieved from any liability which the stockholder may be required to pay; the stockholder's liability being fixed by the law of the State wherein the bank is located.

Savings banks, with or without capital stock, are organized institutions for the purpose of receiving money on deposit from their members, *on such terms as may be mutually agreed upon.*

In a savings bank purely mutual, and without capital stock, the conditions upon which money may be received and repaid to its members, are entirely in their personal control. In a savings bank organized with capital stock, the mutual principle is entirely eliminated, and money can be received and repaid to the depositor upon such terms as may be agreed upon between each customer and the corporation, acting through its directors.

Savings banks, organized with capital stock, are institutions having a fixed liability against the stock in case of loss, or insolvency of the bank. In some respects, they are incidentally possessed with commercial qualities and power; but are usually limited by law to a class of investments, which are allowed or prohibited by legislative enactments of the State where they are located. The Legislature, or statutory laws directing what securities may be taken (and in some cases fixing the sum or limit that can be loaned upon lands and other securities), operates as a guardian of the depositor, throwing around such institution such protection and safeguards as are deemed to be wise, the laws becoming a financial shield to those transacting business with the bank.

CHAPTER V.

THE ORGANIZATION OF BANKS AND PROOF OF CORPORATE EXISTENCE.

§ 20. Preliminary steps — organization of national banks.

Section 5133, Revised Statutes of the United States provides as follows:

"Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office."

The foregoing section provides for the formation and organization of a national bank. The language of the statute is, that a national bank can be formed "by any number of natural persons, not less in any case than five."

§ 21. Who are natural persons.

Human beings, without distinction as to race or color, male or female, are natural persons. Corporations, joint-stock companies, firms, or associations are prohibited from the very nature of their creation and powers in forming or becoming a principal in the formation or organization of national banks. While the stock of a bank can, after its formation, be legally held or acquired by a corporation, it cannot acquire the same as a subscriber in the primary proceedings of organization.

§ 22. Who can form a bank.

Any person who can legally enter into a binding and lawful contract, which cannot subsequently be repudiated by him, can be an incorporator of a bank. Infants, persons under age, may

enter into contracts; but having the power to repudiate the same upon arriving at the age of maturity, should not be permitted to become incorporators of a bank.

§ 23. Married women as incorporators.

There is nothing in the statute prohibiting, in direct language, a married woman from becoming an incorporator of a national bank. The law of the State in which she resides, and where the bank is to be put in operation, may place some inhibition upon her rights, and operate as an estoppel; but if the law of the State in which she resides authorizes her to make contracts, and places her in a position to bind herself to all liabilities and obligations of a stockholder, she is clothed with full power to become an incorporator; but inasmuch as the laws of the several States differ as to the rights of a married woman in regard to her separate estate and property, and as to the effect of covenants and agreements made by her as well as to the form of acknowledgment of instruments executed by her, all organization papers, required in the formation of a bank, bearing her signature, must be accompanied by a copy of the law of the State, which certifies that she has the power to be a party to the organization.

It has never been contended that women are not "natural persons," but it is interesting to know that the question has frequently been before the courts.

The Supreme Court of the State of Massachusetts, in the opinion of the justices of the Governor and Council, where the statute authorized the Government to appoint nine persons, etc., as a board of health, had occasion to express its opinion that the word "persons" in its natural and usual signification, included women as well as men.[1]

Where also the word "person" was used in a legislative act, "natural persons" will be intended.[2]

The articles of association, organization certificate, and certificate of officers and directors must be executed in duplicate, one copy of each being filed in the office of the Comptroller of the Currency, and the other retained by the bank. The organization certificate must be acknowledged before a judge of a court of record, or before a notary public having a seal.

[1] Mass. Rep. 136, p. 58.

[2] Blair v. Worley, 2 Ill. 177.

After the execution of the organization certificate, where the directors are not designated in the articles of association, the shareholders should proceed to elect directors as provided in section 5145, Revised Statutes of United States. After election, each director is required to take the oath of office, which form of oath will be furnished on application to the Comptroller of the Currency. (For form, see Appendix.) A person, to be elegible as a director, must be a citizen of the United States, and own in his own right at least ten shares of the capital stock of the bank, such stock not to be hypothecated, or in any way pledged as security for a loan or debt.

Three-fourths of the directors must have resided in the State, territory, or district in which the association is located, for a year or more immediately preceding their election, and must be residents therein during their continuance in office.

All the preliminary steps having been taken by the board of directors, and the officers of the association having been chosen, and by-laws duly adopted according to law, and the certificate of authority issued by the Comptroller of the Currency, authorizing the bank to begin business, the certificate having been published according to the requirements of law, and forwarded to the Comptroller, the organization becomes a banking corporation from the date of the issuing of said certificate.

Organization of State banks.

The Constitutions of the various States, and the statutory laws enacted therein, control the right of banking within the State. A State banking corporation, unless special provisions are made providing how it shall be incorporated, can be incorporated only under the general incorporation laws of the State authorizing the formation of corporations.

Articles of incorporation are prepared setting out the name of the corporation, the purpose for which it is formed, the place where its principal business is to be transacted, the term for which it is to exist, the number of directors which the corporation shall have, the amount of the capital stock, and the amount actually subscribed, and by whom. These provisions may vary in the different States.

The bank must have a name; and if the name selected infringes upon the right of a bank previously incorporated, the Secretary of State should refuse to grant or issue the articles. It is well settled that where a corporation attempts to obtain or use a name which has been granted to another, and under which a large business has been built up, the courts are frequently called upon to prevent one corporation from using the name of another, and in some of the States the statute especially forbids a corporation from using the name or a similar name of a friendly corporation.

Where the statute of a State permits a corporation to have more than one place in the State where it may conduct business, a State bank may establish branches therein.

It is held by the Supreme Court of the State of Michigan that a bank located in one county, and having its principal place of business fixed by its charter, violates the same by establishing an agency in another county, where it receives deposits, sells exchange, and conducts a general banking business.

§ 24. Term of existence.

The law provides that the articles of incorporation shall fix the term or life of the corporation. The time must be fixed, and a charter cannot be obtained for a longer term than that fixed by the law.

It must also, when incorporated, and where required by the statute, show the amount of capital stock actually paid in. The statute regulating national banks provides when and how the capital shall be paid.[3]

§ 25. Purpose of corporation.

The articles must also set out the purpose of the corporation. This is obvious, especially where the Constitution of the State prohibits a corporation from performing any business other than that for which it is incorporated. For example, a bank incorporated to conduct a general commercial banking business should not be permitted under a commercial charter to conduct a savings bank business, a dry goods business, or a real estate business. This question is more fully discussed under a subsequent chapter upon the powers of banks.

3 § 5140 R. S. U. S.

§ 26. Location.

It must also have a place where its principal business is to be transacted. The National Banking Act, section 5190, Revised Statutes, United States, provides that the usual business of the bank shall be transacted at an office or banking house located in the place specified in its organization certificate. The question as to whether a national bank can have a branch office in the same town is discussed (see organization of branch banks).[4]

§ 27. Capital required.

The statute of each State must be complied with as to the amount of the capital required to be paid up, and whether it shall be paid in money or otherwise.

In Pacific Trust Co. v. Dorsey, 72 Cal. 55, the court holds that a promissory note given cannot be received as cash or as capital paid up. The court says:

"The defendant's note was actually received by the corporation, and was a thing in action or evidence of debt. The first section of the act concerning corporations, and persons engaged in the business of banking 'required every corporation, and all persons doing a banking business in this State, in January and July of every year, to publish and file for record a sworn statement of the amount of capital actually paid into such corporation, or into said banking business; *provided* that nothing shall be deemed capital actually paid in, except money *bona fide* paid into the Treasury of such bank; and under no circumstance shall the promissory note, check or other obligation of any director or stockholder, or of the proprietors or proprietor of any such bank, be treated, computed, or in any manner considered any part of such actually paid-in capital.'

"Under this statute defendant's note could not be advertised to the world, or treated as a part of the paid-up capital of the bank."

§ 28. Requirements of law essential.

The process of creating a corporation being an artificial one, all the requirements contained in the general law are held to be essential.[5].

[4] Mershants' Nat. Bank *v.* State Nat. Bank, 10 Wall. 604, Burton *v.* Burley, 9 Biss. U. S. 253; Armstrong *v.* Second Nat. Bank of Springfield, 38 Fed. Rep. 883.

[5] Doyle *v.* Mizner, 42 Mich. 332.

In the case of Martin v. Deetz, 102 Cal. 55, the court says: "As to the necessity of filing the articles with the proper county clerk, the law as deduced from the authorities cited is thus stated in Morawetz on Corporations, section 27: 'A substantial compliance with all the terms of a general corporation law is a pre-requisite of the right of forming a corporation under it. Thus, where it is provided that a certificate or articles of association, setting forth the purposes of the corporation about to be formed, the amount of its capital and other details, *shall be filed with some public officer*, and performance of this requirement is essential; and until it has been performed the association will have no right whatever to assume corporate franchises.' And again, the same author says: 'In order to prove the existence of a corporation *de jure*, i. e., a corporation having a legal right to exist, it is necessary to prove not only the existence of a corporation *de facto*, but also the legislative authorization of its existence. A public law authorizing the formation of a corporation will be judicially recognized without proof; but proof would be necessary to establish that the corporation was formed pursuant to the law, and that any conditions precedent to the legal right of forming the corporation have been fulfilled.'"

It is held in the case of Mokelumne Hill Min. Co. v. Woodbury, 73 Am. Dec. 658, that the filing of a certified copy of articles of incorporation with the Secretary of State is not necessary in order to acquire a corporate existence for certain purposes. When the articles are filed with the County Clerk, as far as individuals are concerned, the corporation acquires a valid legal existence. The filing of a certified copy with the Secretary of State is exclusively a matter between the corporation and the State, for which the latter alone has a remedy by direct proceeding.

§ 29. Organization, when complete.

The organization of a bank becomes complete when the laws have been complied with; and when the certificate of authority has been issued by the *proper authority*, it is held by the Supreme Court of the United States, in the case of Casey v. Galli, 94 U. S. 673, that the plea of *nultiel* corporation cannot be interposed as against said certificate, the court says:

"The plea of *nultiel* corporation cannot be interposed as against a certificate of the Comptroller of the Currency which has been issued to the bank by him. The Comptroller was clothed with jurisdiction to decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all purposes of this litigation.

"It has the same effect, and for the same reason, as his determination and order with respect to the amount to be collected from each stockholder in the event of the failure of the association. No question can be raised in this collateral way as to either.

"In Thatcher v. Bank, 19 Mich. 196, it was held that whether there was any defect in the process of organization was a question for the Comptroller to decide, and that 'His certificate of compliance with the Act of Congress removes any objection which might otherwise have been made to the evidence upon which he acted.' In this we concur."

"Corporate Existence: A grant or charter may be presumed from long-continued exercise of corporate powers; but to give rights to this presumption, the acts done must bear the impress of corporate acts; must be such as corporations are competent, and individuals incompetent, to perform. Green v. Dennis, 16 Am. Dec. 58: and a charter will be presumed to exist from long exercise of corporate rights, or from other circumstances; Selma & T. R. R. Co. v. Tipton, 39 Ind. 344. Where a corporation has gone into operation and rights have been acquired under it, every presumption should be made in favor of the legality of its existence: Hagerstown T. R. Co. v. Creeger, 9 Id. 551. But it is sufficiently organized to bind subscription to the capital stock when the parties mentioned in the charter have, in pursuance of its terms, by written articles of association organized themselves, and opened books of subscription.

The principal case is cited in Harris v. McGregor, 29 Cal. 125, to the point that there must be a substantial compliance with all the requirements of the statute by persons seeking to become a body corporate, but the corporation can be considered *in esse*. Consequently, a certificate of incorporation which does not set forth the name of the city or town or county in which the principal place of business of the corpora-

tion is to be located does not establish the existence of a corporation. It is also cited in Spring Valley W. W. v. S. F., 22 Cal. 434, to the point that the failure to file a duplicate of the articles of association with the Secretary of State, is not a fatal defect." [6]

The process of organization being complete and the by-laws for the corporation adopted as required by law, the bank becomes a lawful institution denominated a private corporation, and can begin business. In the beginning of business its very first act may be contested, and the question of its due incorporation and power to act be brought to issue, and in such event proof of corporate existence is required.

§ 30. Organization of branch banks.

Under national authority, a national banking institution has no authority to establish a branch banking institution, except by special provision or authority from Congress. This authority was granted at Chicago, Illinois, during the World's Columbian Exposition to any national bank located in the city of Chicago, which might be designated by the World's Columbian Exposition. The branch bank was restricted by the act to have only such rights as the bank to which it belonged, and limited to conduct such business for a period of two years.

The question of privilege in the establishment of a branch bank seems to be settled that a national bank has no right to establish branch banks without special legislative authority. The ruling is upon the principle, no doubt, that the bank must have a location or place where all its business is to be transacted, and branches, especially if established ouside of the city or town, and at a place other than the location of the mother bank, would lead to conflict as to where notes should be protested, and payments to be made. But where State banks, which at the time of the conversion into a national bank have branches established, under section 5155 Revised Statutes, United States, may maintain such branches. But where such branches are maintained "the amount of the circulation redeemable at the mother bank and each branch (is) to be

[6] Mokelumne Hill Mining Co. v. Woodbury, 73 Am. Dec. 658.

regulated by the amount of the capital assigned to and used by each."

In the case of Merchants' National Bank v. State National Bank, 10 Wall, 604, it is held that the provisions requiring "the usual business" of the association to be transacted "at an office or banking house in the place specified in its organization certificate" must be construed reasonably, *and a part of the legitimate business of the association which cannot be transacted at the banking house, may be done elsewhere.*[7]

The Comptroller of the Currency in his report of 1902, upon the question or right of a national bank to maintain a branch or agencies principally for the reception of deposits elsewhere than at its banking house in the same or adjacent locality, says:

"The only provision of law relating to branch banks, is the National Bank Act, is found in section 5155, United States Revised Statutes, and reads as follows:

It shall be lawful for any bank or banking association, organized under State laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain. * * *

The granting of this special privilege to State banks and the absence of any similar provision in the law with respect to banks of primary organization have always been construed by the Comptroller to imply that banks of the latter class were not permitted to have branches. The section cited absolutely restricts branch banks of converted associations to such as have a definite proportion of the capital of the parent bank assigned to them, and it is not to be assumed that the law contemplated that associations of primary organization should be permitted to assign any portion of their capital to and operate branches.

This fact is further to be inferred from section 5138, United States Revised Statutes, which prohibits the formation of asso-

[7] Burton *v.* Burley, 9 Biss. (U. S.) 253; Armstrong *v.* Second Nat. Bank of Springfield, 38 Fed. 883; Bowman *v.* Cecil Bank, 3 Grant Cas. 33.

ciations with less capital than $200,000 in cities of population exceeding 50,000, and contains similar provision with respect to banks organized in places with less population than 50,000.

To permit the establishment of branch banks would not only render possible an evasion of the provisions of section 5138, but tend to discourage the organization of banking associations which, in the absence of such branches, might be formed.

Section 5134 provides in part that the organization certificate of a national bank shall show "the place where its operations of discount and deposit are to be carried on," and section 5190 that "the usual business of each national banking association shall be transacted at an office or banking house (not at offices or banking houses) located in the place (not places) specified in its organization certificate."

The words "place" and "at an office or banking house" have always been construed by the Comptroller to mean the legal domicile of the corporation, of which it can have but one; and this construction is sustained by the Solicitor of the Treasury in an opinion rendered August 10, 1899, on the question of the right of a national bank to establish and maintain an auxiliary cash room at some point distant from its banking house, for the purpose of receiving deposits and paying checks.

The Solicitor says:

This section (5190, U. S. Rev. Stat.) contemplates that the usual business of a national banking association shall be transacted at one office and banking house, and as receiving deposits and paying checks belonging to the "usual business" of a bank, I am of the opinion that the statute does not authorize the establishment of an auxiliary cash room in a different part of the city for the purpose proposed. Besides, it may be observed that if a national banking association can lawfully establish and maintain a separate office for receiving deposits and paying checks, it could as well establish as many of such auxiliary cash rooms in the city of its corporate residence as its business might require; and, indeed, the entire business of the bank may be parceled out and conducted in the same way all over the city.

The Supreme Court of the United States, in the case of Armstrong v. Second National Bank, 38 Fed. Rep. 886, involving, among other things, the question of the right of a

national bank to cash a check elsewhere than at its banking house, held that:

Under this section (5190) it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than at its office or banking house.

If, therefore, it is unlawful for a national bank to cash a check elsewhere than at its banking house, it is likewise unlawful for it to discount notes or to receive deposits elsewhere, for one is as much a part of the "usual business" of a bank as the other.

While it is obviously impossible for a bank to transact its entire business within the four walls of any single building, it is not held that the law contemplates that the "entire business," as distinguished from its "usual business," shall be transacted in its banking house.

In the case of The Merchants' National Bank v. The State National Bank, 10 Wall. 604, it was held in this connection that:

The provision requiring the "usual business" of the association to be transacted "at an office or banking house specified in its organization certificate" must be construed reasonably, and a part of the legitimate business of the association which cannot be transacted at the banking house may be done elsewhere.

The question involved in this case was the right of the bank's officers to purchase gold elsewhere than at its banking house, and the court held that:

The gold must necessarily have been bought, if at all, at the buying or selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it.

The "legitimate business" of a bank, therefore, which a reasonable construction of the law would permit to be done elsewhere than at its banking house would seem to be restricted to transactions similar in character to that involved in the decision quoted, and not the ordinary and usual business of receiving deposits and cashing checks.

The argument has been advanced that clearance house associations are equivalent to branch banks, and the recognition by the National Bank Act of the one affords warrant for the

establishment of the other; but such argument has no apparent force, as the two institutions are entirely dissimilar in character and purpose. The principal object of the former is to facilitate exchange and to adjust balances between banks, while that of the latter is to transact the usual business of a bank with its customers.

While the National Bank Act does not in express terms prohibit the establishment and maintenance of branch banks or agencies by associations of primary organizations, the implication to that effect is clear, and the courts have held that what is implied is as effective as that which is expressed.

That the act does not contemplate the operation of branch banks by national banks of primary organization is evidenced by the fact that in 1892 a special act was approved authorizing the operation of a branch by a Chicago national bank on the World's Fair Grounds. In 1901 similar legislation was enacted by Congress in connection with the Louisiana Purchase Exposition, to be held in 1904.

The States authorizing branch banks or agencies, and the regulations and provisions of law, as compiled by the Comptroller of the Currency, are as follows:

Alabama.—Section 1089 of the Code of Alabama (1896), relating to the corporate powers of banks of discount and deposit organized in the State, provides in part that they (banks) "may fix and locate offices, agents, and agencies at places in the State other than the principal place of business."

Arizona.—Branches and agencies appear to be authorized by section 140, title 1, chapter 7, of Revised Statutes, and also appear as one of the corporate powers. Foreign corporations must file certified copy of articles of association with the secretary of the State or Territory and county recorder of the county in which the principal office is located. The agent must be a *bona fide* resident of the county. Branches: The Bank of Arizona (Prescott), at Jerome; the Arizona Central Bank (Flagstaff), at Williams and Kingman; the Bank of Bisbee, at Naco; the Gila Valley Bank and Trust Company (Solomonville), at Morenci and Clifton.

Arkansas.—Governor states that "we have no banking laws in this State other than general banking laws, which have been

established by custom and the law merchant." Operation of branches discretionary with board of directors.

California.—Under special law, but covered by general agency law. The right of a bank to establish agencies has never been passed upon by the State Supreme Court. It is stated that, "The law may permit agencies to be established within the county by the parent bank, but it certainly has no authority to conduct a general banking business." Foreign banking corporations have the right to establish agencies under the law, but have not greater corporate privileges than accorded State banks. Branches of foreign banks in operation in San Francisco: Anglo-California Bank, Comptoir National D'Escompte de Paris, London, Paris, and American Bank, Limited; Agency, Bank of British North America, Canadian Bank of Commerce, Wells, Fargo and Company's Bank, International Banking Corporation.

Colorado.—No law authorizing the establishment of branches or agencies.

Connecticut.—The law forbids the organization of any branch or agency, or the employing of any agent or person to make loans at any other place than the banking house.

Delaware.—Banking privileges are not granted under General Corporation Law, nor are foreign corporations allowed to do banking business in the State. Banking powers in the State are only secured by special act of the Legislature, in consequence of which each State banking institution is governed by the special creative act. The Farmers' Bank of the State of Delaware has branches at Wilmington, Dover, and Georgetown. The Sussex Trust and Safe Deposit Company is operating branches at Lewes, Georgetown, and Milton.

District of Columbia.—The organization of banking institutions is confined to national banks and to loan and trust companies, under the act of October 1, 1890. Branches of national banks and trust companies are not authorized. There are a number of private banks, banking firms, and branches of savings banks doing business in the District without license tax to the District government.

Florida.—Banks are permitted to conduct branch offices.

Georgia.—Branches or agencies are not authorized, except in the charters of three banks. The banks referred to are as

follows (location of branches not given): Bank of Southwestern Georgia at Americus, Farmers and Merchants' Bank of Senoia, and Oglethorpe Savings and Trust Company of Savannah.

Idaho.— There is no law of the State in force in regard to banks or banking institutions operating branches or agencies.

Illinois.— Branches are not authorized by law.

Indiana.—The law does not permit the operation of branches.

Indian Territory.— Section 8 of the act of Congress, approved February 18, 1901, provides in part that any bank or trust company now or hereafter organized under the laws of Arkansas or any other State may transact such business in the Indian Territory as is authorized by its charter and is not inconsistent with the laws in force in the Indian Territory.

Iowa.— Neither State nor savings banks organized and transacting business under the present laws of the State are authorized to establish and maintain branches, either in the town or city where the banks are located or elsewhere. The law is construed as placing loan and trust companies, so far as their right to establish branches is concerned, upon the same footing as State and savings banks.

Kansas.— Neither branches nor agencies provided for by law.

Kentucky.— An examination of the corporation laws of the State indicates that there is no law authorizing the establishment of branch banks. The law is not construed as prohibitive. Banks operate branches, no specific information being submitted, however.

Louisiana.— Article 179, Act 1902, allows, on the approval of two-thirds of the stock, the establishment of two branches, which must be in the same parish as the parent bank.

Maine.— There is no general provision of law authorizing State banks to establish branches. Trust companies created by special acts of the Legislature have authority in their charters to establish branches, but the Legislature of 1901 passed a general act which provides that no trust company shall establish a branch or agency until the same be authorized by a special act. This later legislation does not apply to trust companies already established and operating branches. The State

Banking Department exercises supervising power over branches in conjunction with the corporation.

Trust companies having branches: Augusta Trust Company, at Winthrop; Waterville Trust Company, at Corinna, Dexter, Hartland, and Newport; Eastern Trust and Banking Company of Bangor, at Machias and Oldtown.

Maryland.— No provision for the operation of branches by State banks.

Massachusetts.— There are no commercial banks other than national banks and trust companies in operation in the State.

The statute relating to the organization of banks of discount and deposit provides that they shall do business only at their banking house. This prohibition applies to savings banks.

By an act passed by the last Legislature, chapter 365, section 2, the board of commissioners of savings banks has power to authorize, in writing, any trust company to maintain a branch office in the city or town in which its main office is located, for the purpose of receiving deposits, paying checks, and transacting a safe-deposit business.

The Old Colony Company and the State Street Trust Company of Boston have branches in operation in that city.

Michigan.— There is no law authorizing the establishment of branches. Agencies are permitted, which are restricted in their operations to the receiving and paying out of deposits and issuing exchange. Branches: "The Home," "The Dime," and "The Peninsula" savings banks of Detroit operate two branches each in that city. "The People's Saving Bank of Detroit" has a branch, and also "The Lansing Savings Bank."

Minnesota.— No branch banking or branches, or any other financial institutions organized under State laws, can be permitted: nor can the banks of any other State establish branches in this State.

Mississippi.— Branches are authorized by the charters of the banks, not by any general banking law.

Missouri.— Specifically prohibited by statutory enactment.

Montana.— Neither branches nor agencies provided for by law.

Nebraska.— Neither the law nor the charters provide for branches.

Nevada.— Agents of foreign corporations doing business within the State must comply with local requirements relating to State and county license. Branches: The Bank of California, San Francisco, Cal., has a branch at Virginia City, Nev.; the State Bank and Trust Company of Carson City has a branch at Butler.

New Hampshire.— Bank Commissioner states that there is no law directly authorizing the establishment of branches or agencies, but that he is not aware of any law which would prohibit such a practice within certain limits. No branches are in operation.

New Jersey.— The laws of New Jersey are the most liberal, with respect to branches, of any State in the Union.

Section 7 of the General Corporation Act of 1896 provides that any corporation in this State may conduct branches in any other State or in foreign countries, and have one or more offices out of this State; and may hold, mortgage, and convey personal property out of such State, provided notice of such object is included in its certificate of incorporation. In 1889 an act was passed which provided that no corporation, bank, etc., should establish or maintain any branch or agency, nor have more than one place of business in the State without the approval of the Board of Bank Commissioners. This act, however, was repealed in 1889. Prior thereto, however, The Asbury Park and Ocean Grove Bank had established a branch at Ocean Grove, and The People's Bank of East Orange a branch at South Orange.

New Mexico.— The law has been held to prohibit the establishment of branches or agencies.

New York.— Section 89 of chapter 689 of the Laws of 1882, as amended by chapter 410 of the Laws of 1898, permits a bank located in a city of over 1,000,000 inhabitants, with the approval, in writing, of the Superintendent of Banks, to open and keep one or more branch offices in such city for the receipt and payment of deposits and for making loans and discounts to the customers of such branch office, only providing that its certificate of incorporation shall so provide. No bank in this State has a charter which originally provided for branches; but a number of banks in the city of New York have amended their charters so as to include therein such provisions. Section

89 referred to provides in part that "before opening any branch office the approval, in writing, of the Superintendent of Banks shall be first obtained, and no discounts shall be made except such as have been previously authorized by the board of directors." Penalty for violation of the act is $1,000 for every violation.

The Bank of Jamaica (Long Island) has branches at Elmhurst, College Point, and Richmond Hill. The Brooklyn Bank has made arrangements for an office, but has not yet opened. The Corn Exchange Bank has twelve branches within the corporate limits of Greater New York. The Colonial Bank of New York has five branches. Far Rockaway Beach Bank has a branch at Rockaway Beach. The Hamiltotn Bank, The Mechanics' Bank, the Mechanics and Traders' Bank, The Twelfth Ward Bank, The Twenty-third Ward Bank, The Union Bank, and the Coney Island and Bath Beach Bank have each a branch in Greater New York; and the New York Produce Exchange Bank has four branches.

North Carolina.— There is no general law authorizing the establishment of branch banks. Most of the banks operate under special charters granted by the Legislature, and in some instances the charters granted contain authority for the operation of branches.

North Dakota.— Branches or agencies not provided for by law.

Ohio.— Branches are not authorized by law.

Oregon.— There are no banking laws on the Oregon statute books; and there are, consequently, no parent or branch banks as recognized by the State in operation. The State issues no charters to banks nor has it on its statute books any laws pertaining to the operation of banks.

Pennsylvania.— Branches or agencies of banks are not authorized by the laws of this State. One savings institution, in conformity with an amendment of its charter, obtained from the Legislature an amendment having the approval of the Court of Common Pleas of the county in which the institution is located, and is endeavoring to establish a branch, but the question is now pending before the State Attorney-General.

Rhode Island.— The General Laws, chap. 171, § 11, pro-

hibit the establishment of branches except by authority of the General Assembly.

South Carolina.— The Code of 1892 of the Banking Laws of State contains no authority for the establishment and operation of branches by State banking institutions.

South Dakota.— Branches or agencies not provided for by law.

Tennessee.— Under the law, branches of all corporations are permissible, the only requirement being that the charter be registered in the register's office of the county where the branches are located. The law governing branches is the same as for the parent bank, and the branches are operated in all respects as the parent banks. No information submitted as to the banks operating branches.

Utah.— Laws of the State do not authorize corporate banks to conduct branches or agencies in the State. One private bank (name not given) has a branch.

Vermont.— Branches or agencies are not authorized by the banking laws, nor by the charter of any bank.

Virginia.— Branches permissible, but none in operation.

West Virginia.— Each bank must be operated under special charter in an independent way. State banks may hold stock in other banking corporations.

Wisconsin.— Incorporated banks of Wisconsin cannot, under the law, operate branches, except possibly in the large cities where the branches are located within the same municipality as the parent bank. The certificate of incorporation of a State bank must specify the particular city or town where the business of the bank is to be carried on. Branches: The Second Ward Savings Bank of Milwaukee operates two branches; the German-American Bank of Milwaukee also operates a branch.

Wyoming.— The laws do not contemplate the establishment of branches or agencies.

Where the statute of a State prohibits a banking corporation the privilege of establishing branches, an agency cannot be created. But where the statute is silent upon the question, and the charter permits the establishment of branches, any number of branches may be established by the parent bank,

and they may conduct business as agencies of the parent bank. But if the charter fails to provide for branches, the parent bank cannot establish branches. But where the statute of a State authorizes corporations which are formed under the general laws of a State the privilege of establishing agencies or branches in the State, a banking corporation organized and incorporated under such a general law may establish branches.

A corporation has only such powers as are granted to it by law, and it cannot establish branches in the State where this power or privilege is prohibited.

It is held in the case of People v. Oakland County Bank, 1 Doug. (Mich.) 282, "where by its charter a bank is located in one county, and it establishes an agency in another county where it receives deposits and buys and sells exchange, it thereeby violates its charter."

The court further says, in determining this case: "The last, and most important question, remains to be considered; and that is, whether the establishment of an agency in the city of Detroit was a violation of the charter of the defendants? By the act of the incorporation the stockholders were authorized to locate the bank in the county of Oakland. It follows, therefore, that if the corporation has undertaken to exercise any of its franchise without that county, it has usurped an authority in violation of law, and must suffer the penalty which that law inflicts. The case admits that the bank redeemed its bills, kept deposits, and as incident to such redemption, bought and sold exchange at the agency. Did these acts, or either of them separately considered, violate the law which gave a legal existence to the defendant? To determine this question, it is only necessary to define what business this bank was authorized by the law of its creation to do and perform. Such an examination will lead to the conclusion that it is a bank not simply of discount, but also of deposit. It is quite manifest that the defendants could not establish in this city an office of discount. If so, may it not equally be intended that they cannot establish an office of *deposit?* To my mind, the conclusion is irresistible. It requires no profound knowledge of the mysteries of banking to know that the amount of discounts, in institutions which profess to be guided by safe rules, is regulated chiefly by two considerations: First, the amount of actual capital paid in,

and secondly, the amount of deposits. If banks did not discount upon the strength of their deposits, their profits would be greatly diminished; and the discounts predicated upon such deposits, in a well-regulated bank, having its regular customers, are always deemed an entirely safe operation. But it is unnecessary to push our inquiries any further upon this point, as we are all clearly of opinion that, in this respect, there was the assumption of an authority not warranted by law."

The subject is further discussed in the case of The Southwestern National Bank v. The Commonwealth, and it is there held that depositing money with another bank, for the redemption of notes, is not the establishing of an agency.

Therefore, where branches are authorized by law they are subject only to such powers and authority, as may be granted to them by the mother bank. They cannot exercise original authority which is not delegated to them. And the mother bank has authority to collect and enforce the payment of any and all debts due the branch bank.[7a]

Where branch banks are authorized to be established in the State, it is not necessary to incorporate them. The mother bank can establish the branch, using the name obtained by the mother bank from the State. But in doing so the branch bank must be designated by all of its signs as such, so the general public may have the full knowledge that they are dealing with the agency.

§ 31. Proof of corporate existence.

When the corporate existence of a bank comes directly in question, which may arise when the State brings suit through its Attorney-General, in the name of the People of the State, to forfeit its Charter, proof of performance of every act required, whether by general law or special charter, must be made.

In collateral proceedings, being those where the corporate existence is denied or affirmed, in a suit between the bank and any party other than the State, the rule is held to be different. The fact is proved by putting in evidence the certificate of

[7a] Smith *v.* Lawson, 18 W. Va. 212; Bank of Augusta *v.* Earl, 13 Peters, 519.

incorporation. The corporate minutes proving an organization and use of the corporate name of the bank in business.[8]

The corporate existence of a plaintiff in ejectment may be established by evidence that it was a corporation *de facto*.[9]

One who has dealt with a corporation as such is estopped to deny its existence by demurrer.[10]

The *de facto* incorporation can be shown by oral evidence, that is, the carrying on of a general banking business, as a bank under a certain name.[11]

The fact of incorporation is proved by putting in evidence the certificate of incorporation. The corporate minutes proving an organization and use of the corporate name of the bank in business, etc.[12]

The fact that the certificate of incorporation of a national bank is signed by a deputy comptroller, a deputy appointed by the Comptroller of the United States, cannot be raised as an objection to its introduction in evidence; nor, that at the date of such certificate he was not clothed with authority to execute the power.[13]

Where the laws of a State require a foreign corporation to file within a certain number of days after commencing business within the State, a copy of their articles of incorporation with the Secretary of State: Held, that individuals who hold themselves out as a corporation, by complying with the requirements of such a law, will not be permitted to deny their corporate existence when sued by persons who have acted in good faith upon said representations.

The Comptroller's certificate, together with proof that the bank has been acting as a bank for a long time, is sufficient

8 Casey, Receiver, *v.* Galli, 94 U. S. 673; Albert *v.* State, 65 Ind. 413; Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85; Bullard *v.* Bank, 18 Wall. 589; Tapley *v.* Martin, 116 Mass. 275; Yakima Nat. Bank *v.* Knipe, 6 Wash. 348; Aspinwall *v.* Butler, 133 U. S. 595; Bank of Manchester *v.* Allen, 11 Vt. 302; Williams *v.* Union Bank, 21 Tenn. 339; McCormick *v.* Market Nat. Bank, 165 U. S. 538; Fresno Canal & Irri. Co. *v.* Warner, 72 Cal. 379; McCallion *v.* Hibernia Sav. Loan Soc., 70 Cal. 163; McVicer *v.* Cone (Or), 28, p. 76.

9 Oakland Gas Light Co. *v.* Dameron, 37 Cal. 663.

10 Bank of Shasta *v.* Boyd, 99 Cal. 604; Cowell *v.* Springs Co., 100 U. S. 61; Close *v.* Glenwood Cem., 107 U. S. 466.

11 Yakima Nat. Bank *v.* Knipe, 6 Wash. 348.

12 United States Bank *v.* Stearns, 15 Wend. 314.

13 Keyser *v.* Hitz, 133 U. S. 138; Aspinwall *v.* Butler, 133 U. S. 595.

evidence to establish *prima facie* the existence of the corporation of a national bank.[14]

§ 32. When the life of bank corporation commences.

A national bank becomes a corporation from the date of its organization certificate.[15]

The certificate upon receipt thereof must be published according to requirements of section 5170, Revised Statutes of the United States.

The proof of publication of said certificate should be promptly sent to the Comptroller of the Currency.

The life of a corporation does not date from the time it begins to do business, but from the date of its organization.[16]

"Where the statute points out the manner in which the corporation shall be organized, and the direction of the statute is followed, this brings the corporation into existence so that it may enter upon the objects of its creation." [17]

14 Mix *v* Nat. Bank of Bloomington, 91 Ill. 20; Merchants' Nat. Bank *v.* Glenden, 120 Mass. 97.

15 U, S, Rev. Stat., §§ 5168, 5169.

16 Whetstone *v.* Ottawa University 13 Kan. 320; Hanna *v.* International Petroleum Co., 23 Ohio St. 622.

17 1 Thomp. on Corp. § 217, and author cited.

CHAPTER VI.

BY-LAWS.

§ 33. Power to make inherent, in corporations.

The power of a corporation to make by-laws is inherent in it. One of the important features of a corporation is the power to make by-laws.[1]

§ 34. By-law defined.

"A by-law is a permanent rule of action in accordance with which the corporate affairs are to be conducted."

A by-law is also said to be a rule or regulation established by a corporation for the government of its officers and members in the management of the affairs of the corporation as among themselves.[2]

§ 35. Power delegated by statute.

The power to make by-laws, as stated, exists at common law as an inherent right of a corporation. The power may also be given by a statute or by the charter of the corporation.[3]

§ 36. Who has power to make by-laws?

The statute fixes and vests the authority usually in the stockholders. The directors have no power to make by-laws unless the statute expressly authorizes it.[4]

The stockholders, however, may delegate their power to the board of directors.[5]

Where the charter confers the power, the directors are authorized to make by-laws.[6]

Where the power is delegated by the charter to the directors,

1 Cook on Corporations, Vol. 1 (5th ed), § 4a.

2 1 Thomp. on Corp. § 935; Flint v. Pierce, 99 Mass. 68.

3 People v. Crossley, 69 Ill. 195; Kearney v. Andrews, 10 N. J. Eq. 70; Juker v. Commonwealth, 20 Penn. St. 484.

4 North Milwaukee, etc., Co. v. Bishop, 103 Wis. 492; Morton, etc., Co. v. Wysong, 51 Ind. 4.

5 Heintzelman v. Druids Relief Association, 38 Minn. 138.

6 Samuel v. Holladay, Woolw. 400 (1869); S. C. 21 Fed. Cases, 306.

a by-law made by the stockholders, it is held, is binding as to past acts on participating stockholders.[7]

Where a charter confers the power upon the board of directors to make by-laws, the stockholders are bound by their action.[8]

§ 37. Where statute provides purpose.

Where the statute provides for what purpose by-laws may be passed, none others can be passed.[9]

Where the by-laws are in conflict with the charter, the latter will prevail.[10]

§ 38. By-laws must be reasonable.

The general rule is, that a by-law must be reasonable. It must not interfere with any vested right of the stockholders. It must not be contrary to public policy. It must not be contrary to the established law of the land. It has been held, in Burden v. Burden, 159 N. Y. 287, that where a bank by its by-laws places the management exclusively into the hands of a person "who may have the exclusive charge and management of the business of the Company," that the by-law is not void as a whole, and until the general manager illegally exercises power the courts will not interfere until such illegal acts are performed. But such a by-law does not divest the directors of a duty imposed upon them by law to perform.

§ 39. When a by-law becomes a law.

A by-law, when enacted in accordance with the charter and statute of the State, is binding upon the individual members from the date of passage; and when required to be entered in a book of by-laws, it becomes a law when so entered.

It has also been held that a by-law authorized by the charter or the statute and not in violation of any constitutional provision or law of the State, is equally binding upon third persons dealing with the corporation; providing they are made acquainted with the same and the business of the corporation.[11]

The contrary doctrine is found in the case of The State v.

7 People *v.* Sterling Mfg. Co., 82 Ill. 457.

8 Cahill *v.* Kalamazoo Mutual Ins. Co., 2 Doug. (Mich.) 124.

9 Ireland *v.* Globe, etc., Co., 19 R. I. 180.

10 Republican Mountain Silver Mines, Ltd., et al. *v.* Brown et al., 58 Fed. Rep. 644.

11 Cummings *v.* Webster, 43 Me. 192–197.

Overton, 24 N. J. Law, 435, where the Court says "All regulations of the company affecting its business, which do not operate upon third persons nor in any way affect their rights, are properly denominated 'by-laws of the company,' and may come within the operation of the principal."

The court further says: "The validity of the by-laws of a corporation is purely a question of law. Whether the by-law be in conflict with the law or with the charter of the company, or be in a legal sense unreasonable, is a question for the court and not for the jury."

The rule may be correctly laid down as follows: *Third persons are bound by the by-laws of a corporation only where they have knowledge of them and are brought into privity with them, and where they operate as a contract between the corporation and such persons.*

§ 40. By-law must be proved.

By-laws and ordinances of a corporation are not judicially noticed, but must be proved as facts. The courts will not take judicial notice of a code of by-laws.[12]

A by-law must be pleaded. The pleader may set it out in full or it may be stated in substance according to its legal effect. When the latter course is pursued, the by-law itself may be introduced as evidence under the pleading.

§ 41. Actions upon by-laws.

In the case of Schrick v. St. Louis Mutual House Bldg. Co., 34 Mo. 423, it is held that an action cannot be maintained if the by-law had been repealed by substitution during the membership of plaintiff and before the bringing of his action.

§ 42. By-law void — which waives liability of stockholder.

"The assets of a corporation being a trust fund for its creditors, and the indebtedness of shareholders to the corporation for their shares being a part of this trust fund, a by-law which attempts to release shareholders from the obligation incurred by their contract of subscription or by their knowing acquisition of shares which have not been fully paid up, by allowing them to pay a percentage of what is due in respect

12 Lucas *v.* San Francisco, 7 Cal. 463; Haven *v.* New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512.

of their shares and to forfeit their shares and be discharged from the obligation of paying the remainder, is void as to creditors of the corporation." [13]

In the case of Slee v. Bloom, 10 Am. Dec. 273, it is held, that a resolution discharging from future assessments any stockholder paying 50 per cent. on his shares, is valid as to consenting creditors, and will protect such stockholders as have complied with its terms, before the dissolution of the corporation.

In the case of Wells v. Black, 117 Cal. 157, where the question of liability of stockholders to depositors in a savings bank is discussed, and where a by-law adopted was not consistent with the constitution and laws of the State, and by virtue of its terms attempted to release from liability the stockholders of the corporation: held to be void and of no binding force upon the depositors.

The court in this case, in defining a by-law, says that "By-laws are the body of rules laid down by the government of a corporation, its officers and stockholders, in the conduct of its affairs."

It is well settled that a by-law cannot be enacted by a banking corporation having capital stock, which would waive the liability of the stockholder to the depositor. However, the depositor can enter into an agreement with the shareholders, waiving the constitutional and statutory provisions of liability; but such an agreement when entered into between the parties must be thoroughly understood.

Where a depositor enters into such an agreement, it would be binding upon the parties.[14]

§ 43. Lien created upon shares of stock.

A lien may be created upon the stock of the corporation for dues owing by the stockholder to the corporation, if provided for by the statute or by the charter of the corporation. Cook on Corporations says: "The weight of authority holds that it may be created by a by-law." The following States hold that a lien may be created by a by-law: Alabama,[15]

[13] Cyclopedia of Law and Procedure, vol. 10, p. 361.

[14] French v. Teschemacher, 24 Cal. 518; Wells v. Black, 117 Cal. 161; Sedgwick on Statutory and Constitutional Law, 111.

[15] Planters' etc., Ins. Co. v. Selma Sav. Bank, 63 Ala. 585.

California,[16] Connecticut,[17] Iowa,[18] Maine,[19] Mississippi,[20] Missouri,[21] New Hampshire,[22] New Jersey,[23] Rhode Island,[24] United States.[25]

The power to prescribe by-laws of a national bank is vested in its board of directors; but a national bank cannot, even by provisions framed with the direct view to that effect, in its articles of association, or by a direct by-law, acquire a lien on its own shares of stock held by persons who are its debtors.[26]

§ 44. Failure to make by-laws.

Where the statute by expressed terms confers the power upon the corporation to adopt by-laws, it is held that the failure to exercise the power will not render void any of the acts of the corporation which would otherwise be valid.[27]

§ 45. Reasonable by-law.

A by-law is held to be reasonable which requires a depositor in a savings bank to present his book for entry of the amount, which may be withdrawn; but in case of loss of such book, and proof thereof duly furnished the bank of such loss, the bank cannot refuse to pay.

The possession of a pass-book is not always proof of ownership; and a by-law, which states that a deposit will not be paid unless the pass-book is presented, is subject to criticism.

A by-law printed in the pass-book, if reasonable, and signed by the party who accepts the same, will bind him and likewise the bank; and the bank cannot revoke nor amend such a by-law

16 Jennings v. Bank of California, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233; People v. Crockett, 9 Cal. 113.

17 Vansands v. Middlesex County Bank, 26 Conn. 144.

18 Farmers', etc., Bank v. Wasson, 48 Iowa, 336, 30 Am. Rep. 398.

19 Bath Sav. Inst. v. Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996.

20 Holly Springs Bank v. Pinson, 58 Miss. 421, 38 Am. Rep. 330.

21 Spurlock v. Pacific R. Co., 61 Mo. 319; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388.

22 Costella v. Portsmouth Brewing Co., 69 N. H. 405, 43 Atl. 640; by-law reserving lien on shares for shareholder's indebtednes to the corporation not within the prohibition of a statute forbidding restraints upon the free sale of shares. Hill v. Pine River Bank, 45 N. H. 300.

23 Young v. Vough, 23 N. J. Eq. 325.

24 Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

25 Knight v. Old Nat. Bank, 14 Fed. Cas. No. 7,885, 3 Cliff. 429; Pendergast v. Stockton Bank, 19 Fed. Cas. No. 10,918, 2 Sawy. 108.

26 Bullard v. Bank, 18 Wall. 589.

27 Steger v. Davis, 8 Tex. Civ. App. 23, 27 S. W. 1068.

so as to affect the rights of such depositor. It is held that such a by-law becomes a part of the contract of deposit.[28]

§ 46. Defining duties of officers.

The officers of a banking corporation have, by law, certain implied power; and in the absence of a by-law specifically defining their powers, they have the implied power to manage and conduct the business of the corporation, and perform all the necessary acts other than those which are imposed by the statute to be performed by the board of directors.

The by-laws may prescribe in detail the business and acts to be performed by the various officers and agents of the bank. When the duties and acts to be performed are defined by the by-laws, and they contain a restrictive provision, in effect stating that all acts other than those mentioned are prohibited, an officer or agent of the bank has no additional power or authority by implication.

Where the statute of a State prescribes the mode of employment or election of an officer or agent of a corporation, it must be strictly complied with. For example: Where the statute says that the officer must be elected by the board of directors, and it prescribes that such election must be by ballot, an officer of the corporation cannot be appointed by a *vivi voce* vote, or by a resolution.

Also where the statute prescribes that at the time of his election he must be a *bona fide* director of the corporation, the directors cannot legalize the position or office, unless he was at the time a director.

§ 47. Amending by-laws.

The power to amend a by-law is vested in the persons who are empowered to make a by-law.

Where the statute of a State prescribes how a by-law may be amended or repealed, it must be strictly followed.

Where a provision of the charter is made a part of the by-law, such a provision cannot be amended by amending the by-law.

A provision inserted in a charter cannot be amended without amending the articles of incorporation.

28 Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78; Levy *v.* Franklin Sav. Bank, 117 Mass. 448; Kummel *v.* Germania Sav. Bank, 127 N. Y. 488.

Directors of a corporation frequently attempt to amend the by-laws, or the provisions which are a part of the articles of association; but as stated, this cannot be done only by amending the articles.

§ 48. Provisions and form of by-laws.

Banking corporations incorporated under the laws of a State, in adopting and preparing a form of by-laws, should be very careful in the preparation of the same; as a by-law cannot be adopted, or enacted, which is in violation of a law of the State; and all of its provisions must be reasonable.

For form of by-laws for a national bank, as recommended by the Comptroller of the Currency, see Appendix.

§ 49. Statute prescribing time in which by-laws are to be adopted.

The certificate from the Secretary of the State, which is a certification implying the due incorporation of a bank, in itself does not put the corporation into action or life.

Where a bank or other corporation is required by the statute to enact a code of by-laws within a certain number of days after filing the articles of incorporation with the proper officer of the county, where required to be filed, such a statute is not mandatory but directory.[29]

The failure to adopt a code of by-laws within such period of time, though a statutory provision, will not prevent the corporation, after the adoption of by-laws, from thereafter doing business within the State.

But if the act of adopting a code of by-laws, as provided by the statute, is made a part of the organization of the corporation, the organization cannot be complete until all the requirements of the law are complied with; and contracts made during organization are held to be invalid.

An agreement made by a cashier of a national bank, prior to its organization, does not bind the bank unless such agreement is ratified after the organization is perfected under the National Banking Act.[30]

[29] Davies *v.* Smith, 58 N. H. 16, and cases cited.

[30] McDonough *v.* First National Bank of Houston, 34 Tex. 309.

CHAPTER VII.

STOCKHOLDERS' RIGHTS AND LIABILITIES.

§ 50. Who may be a subscriber.

Any person, male or female, other than a minor (whose contracts may be revoked) may be a subscriber for shares of stock in a corporation; provided, however, that the laws of the State in which the party resides and the contract is made, and to be executed, does not interfere.

A married woman may become a stockholder under the law of the State where the contract is made, if not prohibited, and she will be subject to all the liabilities as such.[1]

A married woman in the District of Columbia may become a holder of stock in a national banking association, and assume all the liabilities of such a shareholder, although the consideration may have proceeded wholly from the husband.

The coverture of a married woman who is a shareholder in a bank will not prevent the receiver of an insolvent bank from recovering judgment against her for the amount of an assessment levied upon the shareholders equally and ratably under the statute.[2]

In the case of Witters v. Sowles, 38 Fed. Rep. 700, the court, in discussing the contractual character of the relation and the liability, says:

"Doubtless it would be competent for the Legislature to declare that any married woman who might acquire shares in a corporation should be regarded as a stockholder, and should be liable as such, notwithstanding her shares might be the absolute property of the husband at his option; but in the absence of language to that effect, a statute which makes shareholders liable for the debts of the corporation must be presumed to include only persons belonging to the class who can contract that relation toward the corporation and its creditors.

"The relation is a contractual one and the liability is

[1] Bundy *v.* Cocke, 128 U. S. 185. [2] Keyser *v.* Hitz, 133 U. S. 138.

mounded on the presumed assent of the shareholder to be bound by the terms of the organic law of the corporation."

This is well stated by Allen, J., in Lowry v. Inman, 46 N. Y. 125:

"A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such act he assents to be bound, or that his property shall be charged, with the debts of the corporation, to the extent and in the manner prescribed by the act of incorporation."

The Code of North Carolina, § 1826, enacted in 1871, provides that no woman during coverture shall be capable of making any contract to affect her real and personal estate without the written consent of her husband.

The court, in Robinson v. Turrentine et al., 59 Fed. Rep. 554, in discussing this provision of the Code, and the question of liability and the rights of a married woman purchasing stock in a corporation, without the written consent of her husband, says:

"M. B. Turrentine is a married woman. After her marriage and after the passage of the Act of 1871 of North Carolina (Code, § 1826), the stock in question was transferred to and acquired by her, to use the language of her answer. Her husband, the other defendant, never gave his written consent to the purchase. Mrs. Turrentine is not a 'free trader' under Code, §§ 1828, 1831, 1832."

The court then proceeds to discuss the question of liability of a stockholder as created by section 5151, Revised Statutes, United States, imposing individual responsibility to the amount of the par value of the shares upon stockholders in national banks, which law, he says, makes no exceptions in favor of married women.

The court further says that:

"To hold that a State law, were there such a law, could except certain shares from the liability, would enable States to defeat the policy of the Federal Government in establishing the national banking system. That the Congress has power

to establish and legislate for such banks has not, since 1819, been an open question. McCulloch v. Maryland, 4 Wheat. 316. If a purchase of stocks in a national bank by a married woman without the written consent of her husband gives her the ownership of such stock, judgment must be given against the *femme* defendant. If she owned the stock at the failure of the bank, she is liable to the assessment; if she did not, she is not liable. While the Federal Government exclusively controls the question of the liabilities of stockholders in national banks, it is not doubted but that a State has power to say that, for reasons seeming good to its Legislature, and not in conflict with organic law, a particular class of persons shall not be permitted to own particular classes of property. It may lawfully be provided that a guardian or other trustee may not invest in securities other than those specified by statute. Probably it might be held that a statute might constitutionally provide that purchases by guardians of, say, railroad stock, in the name of their trust, should be absolutely void. In such case it might be held that an attempted transfer of such stock so purchased passed no title; that the stock still remained, although duly assigned and transferred on the corporation books, the property of the vendor; and that the guardian could recover the money paid from the vendor. It would, I think, require strong and plain words to induce courts to give such a construction to an act of the Legislature."

The court holds that the Legislature of a State cannot enact a law in conflict with a statute of the United States.

§ 51. Enforcement of subscription.

A subscription to the capital stock of a proposed corporation, for the purpose of forming it, made by several signers, is valid. The corresponding promise of the other signers, and the common object sought to be accomplished, constitute a sufficient consideration for the promise of each signer, and upon the formation of the corporation and its acceptance, each subscriber becomes liable.

An action against the subscriber to stock upon his subscription according to its terms, is not an action under the statute to recover assessments upon the subscribed capital stock.[3]

[3] The Marysville Electric Light & Power Co., appellant, *v.* F. W. Johnson, respondent, 93 Cal. 538.

A contract in writing, by which the subscribers agree to associate themselves into a corporation for a specific purpose, and to pay to the treasurer of said corporation the amount set against their respective names, is a valid subscription; and an action may be maintained in the name of the corporation, *after it is organized*, against a subscriber.[4]

The court, in discussing this question, says:

"In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, 'to and with each other,' is not a contract capable of being enforced, or intended to operate as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterward, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to wit, as a contract with the common representative of the several associations."

The question of liability of a subscriber is again presented in the case of The International Fair & Exposition Association of Detroit v. Hiram Walker, 83 Mich. 386; and a subscriber who signed a subscription paper (but not the articles of association), which subscription paper was in the following form:

"For the purpose of purchasing suitable grounds, erecting suitable buildings thereon of a permanent character for fair and exposition purposes, to be upon a plan similar to the Buffalo Exposition, and believing that a corporation, with a capital stock of at least $250,000, should be organized for such purpose, the undersigned agree to subscribe for and take stock in such a corporation for such purposes to the amounts

4 Athol Music Hall Co. *v.* Carey, 116 Mass. 471.

set opposite our respective names: *Provided,* that at least the sum of $100,000 shall be subscribed within sixty days from the date hereof, in order to render our agreement hereto binding.

"Dated Detroit, January 9, 1889."

Was held liable.

The court says:

"The agreement sets out fully the purposes and objects for which the moneys were to be raised. It was to purchase grounds, erect suitable permanent buildings thereon for fair and exposition purposes, and to be on a plan similar to the Buffalo Exposition. Two hundred and fifty thousand dollars, at least, was to be the amount of the capital stock; and the only limitation or condition under which the amount subscribed by each should not be paid was that $100,000 should be subscribed within sixty days. This amount was subscribed within the time. The other parties who subscribed went forward in good faith to carry out the plan named in the agreement, and in reliance that the defendant would pay in the amount of his subscription. He stood by and saw the moneys being expended, the ground purchased, and buildings erected. He attended a meeting, and voted, not only the stock of his two sons, but voted his own, upon the question of the site. This subscription was accepted by the plaintiff, and it has the power to give the stock subscribed for, and has offered to do so. I think this case falls so squarely within the case of Peninsular Ry. Co. v. Duncan, *supra*, that the first proposition of defendant's counsel needs no discussion. It is true that the statute under which the plaintiff in that case organized did require preliminary subscriptions, while the statute in the present case does not; but here, as in that case, the promises to pay the amount subscribed are mutual, and the agreement by the defendant to pay the $5,000 was relied upon by the other subscribers, and between them it was a valid contract, upon which, after organization, the corporation could maintain an action."

Where the purposes of the corporation are defined in the preliminary subscription paper, which paper sets out the purposes of the corporation, and after being signed the articles of incorporation, are changed, by additional or new busi-

ness, the subscriber will be released. The corporation cannot recover against him.[5]

A subscriber to the stock of a corporation may, by the terms of his subscription, vary his liability to calls or assessments from that imposed by the statute. The liability of a subscriber, in such a case, is measured by the terms of his agreement.[6]

A subscription cannot be avoided where the subscriber has partially paid for his stock, upon the ground that the purposes of the corporation have been changed, and differ from those stated in the subscription agreement.[7]

The question whether an action can be brought to enforce a subscription to stock in a corporation, before the corporation is organized, is not presented by the cases; but if an agent is named in the subscription paper to receive the amount from each subscriber, for the benefit of the corporation, the assumption is, that a suit may be instituted before the organization of the corporation in the name of the agent.[8]

§ 52. What constitutes a stockholder.

The issuing of the stock, coupled with delivery, and acceptance, and entry of the name of the owner on the stock books of the corporation, is proof conclusive of ownership.

A subscription to stock of a national bank, and payment in full on the subscription and the entry of the subscriber's name on the books as a stockholder, constitutes the subscriber a stockholder; though the certificate is not issued or taken out.

The Supreme Court, in the case of The Pacific National Bank v. Eaton, 141 U. S. 227, holds, that where a party who agrees to take the new shares of stock being his proportional share, to the doubling of the capital stock of the banking corporation, and paying for it in cash, and receiving a receipt for the same, are acts which are fully equivalent to a subscription to the stock in writing.

He would then become a stockholder, and be properly entered as such on the stock book of the company, and his certifi-

5 Marysville Electric Light & Power Co. *v.* Johnson, 109 Cal. 192.

6 Ventura and Ojai Valley Ry. Co., respondent, *v.* Hartman, appellant, 116 Cal. 260.

7 Walter *v.* Merced Academy Association, 126 Cal. 582.

8 Athol Music Hall Co. *v.* Carey, 116 Mass. 471.

cate of stock being made out ready for him when he should call for it, would hold: It is his certificate.

A stockholder is one who is (in fact) the real owner of the shares and is liable as such, though, when he purchased the stock, he had it transferred upon the stock books to another.

A purchaser of stock in a national bank cannot escape individual responsibility by having his stock transferred to a person pecuniarily irresponsible.[9]

Where stock is transferred and placed upon the stock books in the name of a person who has no knowledge of such transaction, which has been done without his authority or consent, this does not constitute him an owner or establish liability; but where a person is elected a director, and vice-president, of a banking corporation, assuming the active management of the bank, being bound by a statute to own a certain number of shares, and presumed to know the condition of the books of the bank, not only as to whether the required number of shares are held by him, but whether there are the required number of stockholders, and who they are, and does not return a dividend paid him by the bank, at a time when it was insolvent, upon stock transferred to him without his knowledge prior to his election as director, and vice-president, and does not repudiate the transfer except by a return of the dividend to the supposed owner of the shares, he must be held the owner of the stock thus transferred to him on the books.[10]

The general rule is, that, unless the statute otherwise provides in expressed terms, "It is not essential that a certificate should have issued in order to create the relation of shareholder, provided a contract to take stock had been duly made, or provided the rights, privileges, and emoluments of a shareholder had been enjoyed with the consent of the corporation."

The authorities supporting this rule are sufficiently numerous to establish it as the law.[11]

It is held in Chaffin v. Cummings, 37 Me. 76, that, in order to constitute a stockholder, it is not necessary that

[9] Davis *v.* Stevens, 17 Blatchford, 259.

[10] Brown *v.* Finn, 34 Fed. Rep. 124.

[11] Butler's University *v.* Scoonover, 114 Ind. 381, 16 N. E. 642; Chase *v.* Merrimac Bank, 19 Pick. (Mass.) 264, 31 Am. Dec. 163; Chaffin *v.* Cummings, 37 Me. 76; Farrar *v.* Walker, 8 Fed. Cas. No. 4679.

such fact be shown by the corporation records. It is provable by parol.

The court says, "To constitute ownership, it is not necessary that the stock should be paid for. The corporation may give credit for its stock. It is not necessary that certificates should be issued. They only constitute proof of property which may exist without them."

When a corporation agrees that a person shall be entitled to share in its capital, to be paid for in a manner agreed upon, which person has agreed to take any pay for them accordingly, the latter becomes the owner by valid contract made upon the valuable considerations.

The court further says:

"It is insisted, that parol evidence cannot be received, to prove that a person has become the owner of shares; that the records or books of the corporation are the only legal evidence of that fact; and the case of Stanley v. Stanley, 26 Me. 191, is relied upon as having so decided. That case decided that the transfer of stock from one person to another is by statute required to be entered upon the books of the corporation, before it can be effectual to discharge or incur certain liabilities, and that the transfer can be proved only by the books; not that a title to stock originally acquired from the corporation should be so proved.

"The decision upon the facts, as well as the law, being submitted, the court cannot but conclude that the testimony is sufficient to prove that the defendant was an owner of ten shares of the stock, when the debts on which the judgment was founded were contracted by the corporation."

§ 53. Purchase and transfer of stock.

Stock in a corporation may be acquired by subscription, by purchase, by gift, or under a judicial sale by decree of the court.

A stockholder acquiring stock has an unqualified and immediate right to have the stock transferred to him, upon the books of the corporation.

The entry of the transfer on the books, constitutes the act, and from the date of such entry the bank is estopped from setting up any claim or lien against the stock.

The bank may refuse to enter the transfer, if it has a lawful claim or lien upon the stock, or if it has been enjoined by a court of competent jurisdiction.

The endorsement in blank by the owner of the certificate entitles the holder to fill in the blank, and presentation of the same to the bank demanding that an entry of the transfer be made upon the record, and a new certificate issued, establishes his right as a stockholder from the time of such demand, though the bank does not at the time make the transfer or issue to him a new certificate.

A notice given to the bank coupled with a request and tender of a certificate properly indorsed, demanding a transfer of the stock, operates as a release of the stockholder from further liability.

If the bank refuses to enter the transfer on demand, without sufficient cause, it will be liable for damages to the party injured.

Where a certificate of stock, by the conditions set out on the face of the instrument, is made transferable only on the books of the corporation, the title as between the parties (the seller and the purchaser), passes on delivery of the certificate: and the transfer on the book of the corporation is not an essential act to pass the title; but it is very important to the parties that the transfer should be made at the time of sale and delivery, in order that the exact legal liability of the parties may be fixed.

Where the certificate provides that a transfer shall take place only by a cancellation of the certificate, and entry on the books of the corporation, until such entry is made or notice given to the bank, the stock may be attached, in the name of the party appearing as the owner, upon the books of the corporation.

§ 54. Right of stockholder.

Entitled to notice of meetings.

Where the time and place of corporate meeting are fixed by the charter, or the by-laws, this is held to be sufficient notice to the stockholders and no further notice is necessary unless the charter or by-laws require it.[12]

[12] Warner *v.* Mower, 11 Vt. 385, 396; State *v.* Bonnell, 35 Ohio State, 10–15; Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371.

Where no sufficient notice is given by charter, or by statute, or by a by-law, of stockholders' meetings, they are entitled to an express notice of every such corporate meeting.[13]

§ 55. Notice may be waived.

A stockholder may waive his right to have a notice of a corporate meeting served upon him.

When all the stockholders are present or subsequently approve of and ratify an action of the corporation, the notice is waived and the action becomes valid.[14]

A stockholder admitting the validity of a claim against the corporation, which claim is held to be valid, though the meeting was not called in accordance with the statute, it not appearing that any stockholder has ever objected, the meeting is held to be valid.[15]

All who appear at a meeting, wherever held, or however defectively the members are notified, will be bound by the proceedings of those who appear and participate in it without dissent.[16]

§ 56. The right to vote.

The general rule is that shareholders who are registered as such on the books of the corporation have the right to vote.[17]

Corporation cannot vote its own stock.

A corporation holding or acquiring its own stock cannot be voted the same at a corporate election. The statute may regulate the privilege.[18]

Pledgee cannot vote stock.

Where stock has been pledged to the corporation, or some one in trust for the corporation, neither the bank nor the trustee can vote the stock.[19]

13 Wiggin v. Free Will Baptist Church, 49 Mass. 301.

14 Stutz v. Handley, 41 Fed. Rep. 531; Handley v. Stutz, 139 U. S. 417.

15 Clark v. Warwick, etc., 174 Mass. 434.

16 Handley v. Stutz, 139 U. S. 417; Benbon v. Cook, 115 N. C. 324; People v. Peck, 11 Wend. 604.

17 People v. Robinson, 64 Cal. 373, 1 Pac. 156; Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547; Matter of Glen Salt Co., 153 N. Y. 688, 48 N. E. 1104; People v. Devin, 17 Ill. 84.

18 McNeely v. Woodruff, 13 N. J. L. 352; Am. Ry. Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377.

19 Monsseaux v. Urquhart, 19 La. Ann. 482.

In the absence of a statute a shareholder who is delinquent upon an assessment against his stock does not lose his right to vote.[20]

§ 57. Right to vote by proxy.

The right to vote by proxy is generally a right authorized and fixed by statute.[21]

A non-resident shareholder cannot vote by proxy where the right to vote is given by the statute to citizen shareholders.[22]

§ 58. Right of stockholder to inspect records of corporation.

The right to examine, at a proper time and for proper purposes, the records, books and papers of a corporation, is an incident and privilege which goes with the ownership of stock in a corporation.[23]

Where the statute grants the privilege to the stockholder to inspect the records, the motive cannot be inquired into. The shareholder need not give any reason to the officers for demanding the privilege.[24]

The right to make an examination of the books is not confined to a personal inspection by the stockholder himself, but may be made by his agent, attorney, or expert.[25]

[20] Kiman v. Sullivan Co. Club, 26 N. Y. App. 213; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; U. S. v. Barry, 36 Fed. Rep. 246.

[21] C. C. Cal., § 303; Market St. Ry. Co. v. Hellman, 107 Cal. 571, 42 Pac. 225.

[22] C. C. Cal., § 326; Graham v. Oviatt, 58 Cal. 428; *In re* Barker, 6 Wend. (N. Y.) 509.

[23] Mathews v. McClaughry, 83 Ill. App. 224; Ellsworth v. Dorwart, 95 Iowa, 108, 63 N. W. 588, 58 Am. St. Rep. 427, under Ia. Code, § 1279; Legendre v. New Orleans Brewing Assoc., 45 La. Ann. 669, 12 So. 837, 40 Am. St. Rep. 243; Cockburn v. Union Bank, 13 La. Ann. 289; *In re* Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461, affirming 31 N. Y. App. Div. 70, 52 N. Y. Suppl. 343; Commonwealth v. Phœnix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184, citing State v. Bienville Oil Works, 28 La. Ann. 204; Angell & A. Corp., § 681; Grant Corp. 311; 2 Phillips Ev. 313; Redfield Ry. 227; Lyon v. American Screw Co., 16 R. I. 472, 17 Atl. 61; State v. Pac. Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; U. S. Ranger v. Champion Cotton Press Co., 51 Fed. 61.

[24] Foster v. White, 86 Ala. 467; State v. St. Louis, etc., Ry. Co., 29 Mo. App. 301; Mitchell v. Rubber Reclaiming Co. (C. H. 1892), 24 Atl. 407; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio State 189, 56 N. E. 1033, 78 Am. St. Rep. 707; Lyon v. Am. Screw Co., 16 R. I. 472.

[25] Foster v. White, 86 Ala. 467; Ballin v. First, 55 Ga. 546; Ellsworth v. Dorwart, 95 Ia. 108, 63 N. W. 588, 58 Am. St. Rep. 427; State v. Sportsman Park Ass'n, 29 Mo. App. 326; People v. Nassau Ferry Co., 86 Hun 128, 33 N. Y. Suppl. 244, 66 N. Y. St. 801. Contrary, see Clark v. Eastern Bldg., etc., Ass'n, 89 Fed. Rep. 779, which holds that a corpo-

A shareholder who is not registered on the books of the corporation has no right to make an examination of the records.[26]

§ 59. Liability of stockholder to creditors of corporation.

General rule.

The general rule at common law is that shareholders in a joint stock corporation are not liable for debts, except to make good the amount due to the corporation for their shares.[27]

§ 60. Liability cannot be enlarged by a by-law.

By unanimous consent the liability of the stockholder may be enlarged beyond the liability created by law, but such a liability must be unanimous. A by-law or resolution of the corporation cannot create a liability beyond that fixed by the statute.[28]

§ 61. When stockholder liable to corporation, liable also to creditors.

General rule.

The general rule is that a stockholder, if not liable to the corporation, is not liable to a creditor, except where the Constitution or statute of the State otherwise provides.[29]

In the case of Potts v. Wallace, 32 Fed. Rep. 272, it is held that where a subscriber to stock tendered the amount of his subscription to the corporation while it was solvent, and demanded a certificate which was refused him, he was not liable to the assignee in insolvency of the corporation.

§ 62. Liability beyond subscription.

A stockholder has no liability beyond the par value of the stock owned by him, unless such a liability is created by the constitution, the statute, charter, or by contract.

ration will not be required to permit an examination of its books at the request of stockholder who alleges misconduct.

26 Matter of Reiss, 30 Misc. (N.Y.) 234; 62 N. Y Suppl. 145.

27 Toner *v.* Fulkerson, 125 Ind. 224, 25 N. E. 218; Spense *v.* Iowa, etc., Constr. Co., 36 Iowa 407; Wood *v.* Pierce, 2 Disn. 411; Jackson *v.* Meek, 87 Tenn. 69, 9 S. W. 225, 10 Am. St. Rep. 620; Bank of N. A. *v.* Rindge, 57 Fed. Rep. 279; Smith *v.* Londoner, 5 Colo. 365.

28 Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Flint *v.* Pierce, 99 Mass. 68, 96 Am. Dec. 691.

29 Deadwood First Nat. Bk. *v.* Custin Minerva Con. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510; Union Sav. Ass'n *v.* Seigelman, 92 Mo. 635, 15 S. W. 630; Burgess *v.* Seligman, 107 U. S. 20.

The liability of a stockholder in a national bank for assessments made by the Comptroller of the Currency on insolvency of the bank, is not dependent upon the contract of subscription between the stockholder and the corporation, but is created by statute for the benefit of the bank's creditors, and can be neither modified nor released by any act of the corporation.

In the case of Scott v. Latimer, 89 Fed. Rep. 843, the court, in discussing this question, says:

"The liability sought to be enforced in this case is not one created by a contract existing between the corporation and the stockholders, but is one created by statute in favor of creditors, and not in favor of the corporation. It is a liability which cannot be affected, discharged, or released by any action taken by the corporation, or by the combined action or agreement of the corporation and its stockholders. Thus, in Delano v. Butler, 118 U. S. 634; 7 Sup. Ct. Rep. 39, it appeared that the stockholders, in order to meet the liabilities of the bank, had made an assessment of 100 per cent. upon the capital stock which was paid in, but the bank was ultimately compelled to go into liquidation, and the Comptroller made an assessment upon the stockholders under the provisions of section 5151 of the Revised Statutes. The Supreme Court held that the payment of the assessment made by the stockholders did not relieve them from liability for the assessment made by the Comptroller, it being said that:

"'Under section 5151 the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the bank. The assessment under that section is made by the authority of the comptroller of the currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably.'

"It is thus made clear that the liability sought to be enforced in this case is not dependent upon the terms, or in fact upon the existence, of a contract of subscription to the capital stock of the bank, but it is a liability imposed by statute in favor of creditors, and it is a liability, as already said, which cannot be modified or released by any action on part of the corporation or of the corporation and its stockholders. It is created for the benefit of the creditors, and no action on part of the bank can estop the creditors from enforcing their rights in this par-

ticular. Upon whom does the statute impose the liability? In Bank v. Case, 99 U. S. 628, and Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, it was ruled that the actual or beneficial owner of the stock would be liable, and that this liability could not be evaded by the device of transferring the title to a third person, who might be financially irresponsible. "In Pauly v. Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, it is said:

"'It is true that one who does not, in fact, invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligationss, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent, and goes into the hands of a receiver. But this is on the ground that, by allowing his name to appear upon the stocklist as owner, he represents that he is such owner, and he will not be permitted, after the bank fails, and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value. * * * As already indicated, those may be treated as shareholders, within the meaning of section 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners, in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not in fact owners.'"

The contrary doctrine to that just enunciated is: That a stockholder may, by express contract, entered into with a corporate creditor, waive his liability upon a debt, which at the time is incurred.[30]

In the case of Brown v. Eastern Slate Co., 134 Mass. 590, where a bill in equity was instituted against the stockholder of the corporation to enforce payment of the judgment under the statute of the State, the court held that an oral agreement might be shown as a part of the contract to exempt the stockholders from a statutory liability.

[30] Robinson *v.* Bidwell, 22 Cal. 379; French *v.* Teschemaker, 24 Cal. 518; Wells *v.* Black, 117 Cal. 157; Bush *v.* Robinson, 95 Ky. 492; U. S. *v.* Sanford, 161 U. S. 412.

§ 63. Fixing date of liability.

If a liability does not exist by statutory provision at the time of subscribing for stock, a new remedy against stockholders cannot affect those who took shares in the corporation before its passage.

The proposition may be again stated as follows: Where a liability does not exist at the time of subscribing for stock, in a corporation organized under the general laws of a State, a statute cannot afterwards be enacted imposing a liability.

In the case of Grand Rapids Savings Bank v. Warren, 52 Mich. 557, in discussing this question the court says:

"The liability for which this proceeding is instituted arose previous to the passage of this statute, and the claimant at the date of this statute had a right to recover its demands of the stockholders of the Exchange Bank of Big Rapids, on the failure of the bank to pay them. If the Act of 1877 is to be applied to these demands, it takes away the right as to all the stockholders who are non-residents, unless they voluntarily come to the State so that process may be served upon them. It also enables any resident stockholder to escape liability by absenting himself from the State so that process may not be served. And apparently it takes it away as to all estates of deceased stockholders. But an act which could have this effect would be clearly inoperative, at least as to the cases in which its enforcement would release parties before liable, because it would to that extent impair the obligation of contracts. It would be inoperative, therefore, as to this estate. And this, we think, not only in so far as it undertook or assumed to give a new remedy but also in so far as to take away those which existed before.

"We agree, therefore, with the circuit judge, that the claimant was entitled to prove its claim as was done against the estate. We also think that the liability of the shareholders is commensurate with that of the corporation itself, and extends to costs and interest on the judgments."

§ 64. Extent of stockholder's statutory liability.

The extent of liability against the stockholder in a State bank is fixed and determined by the statute of the State.

In most of the States the liability is a double liability.

In the State of California, each stockholder of a corporation is individually and personally liable for such proportion of all of its debts and liabilities contracted, or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him, bears to the whole of the subscribed capital stock or shares of the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim, payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each in conformity therewith. The liability of each stockholder is determined by the amount of stock or shares owned by him, at the time the debt or liability was incurred; and such liability is not released by any subsequent transfer of stock.

A bank charter declaring that " the stockholders of said bank shall be personally and individually liable for all losses, deficiencies and failures of the capital stock of said bank," has been held to make the shareholder personally liable to the creditors of the bank for its indebtedness in proportion to their respective shares in the stock of the same, and not merely bound to keep the capital good by assessments. An important case discussing this question is the case of Queenan et al. v. Palmer et al., 117 Ill. 619. In this case it is held, that where the charter of a banking corporation makes its stockholders individually liable to the amount of the stock held by them respectively to depositors, and other creditors of the bank, for any losses they may sustain, such liability is a common fund for the security of creditors, and a court of equity aside from the ground of discovery, will have jurisdiction of a bill by a creditor for himself and others to enforce such liability, and control the fund thus obtained for their benefit, and distribute the same ratably among them.

An action at law in such case is declared by the court as being inadequate without the bringing of a multiplicity of suits.

Where a bank charter provides that the stockholder shall " be responsible in his individual property in an amount equal to the amount of stock held by him, to make good losses to depositors: " Held by the court that the individual liability was not in the nature of a penalty, and, therefore, en-

forceable only in a court at law; but was primary and subject to the demand of depositors and other creditors equally with the assets of the bank.

In construing the statute making stockholders liable, the court holds that where a charter or statute makes the stockholders of a corporation individually responsible in an amount equal to their stock, "to make good losses to depositors or others," will be construed to make the stockholders liable to all creditors who may suffer from the default or failure of the corporation to pay its indebtedness.

§ 65. Liability of pledgee or trustee.

The Supreme Court of the United States in the case of Rankin v. Fidelity Ins. Co., 189 U. S. 242, in discussing the question as to who are stockholders, pledgees, or trustees, holding stock in a national bank, says:

"1. That liability may be established by allowing one's name to appear upon the books of the corporation as owner, though in fact he be only a pledgee. Pullman v. Upton, 96 U. S. 328. Nor can the real owner exonerate himself from responsibility by making a colorable transfer of the stock, with the understanding that at his request it shall be re-transferred. National Bank v. Case, 99 U. S. 628; Bowden v. Johnson, 107 U. S. 251; Stuart v. Hayden, 169 U. S. 1.

"2. Stockholders of record are liable for unpaid installments, though in fact they may have parted with their stock, or held it for others. Hawkins v. Glenn, 131 U. S. 319.

"3. A mere pledgee, however, who receives from his debtor a transfer of shares, surrenders the certificate to the bank and takes out new ones in his own name, in which he is described as 'pledgee,' and holds them afterward in good faith, and as collateral security for the payment of his debt, is not subject to personal liability as a shareholder. Pauly v. State Loan and Trust Co., 165 U. S. 606. But it is otherwise, if he allows his name to appear on the book as owner, or being the owner, makes a colorable transfer of the stock. National Bank v. Case, 99 U. S. 628."

Where the shares of stock in a banking corporation have been hypothecated, and placed in the hands of a transferee, he

will be subject to all the liability of ordinary owners; for the reason the property is in his name and the legal ownership appears to be in him.[31]

Where the transfer appears to be absolute on the books of the bank, the transferee is liable for the debts of the corporation, notwithstanding he may hold such stock by transfer or assignment as collateral security for a loan to the shareholder from whom he receives the transfer.[32]

In the case of Union Savings Association v. Seligman, 92 Mo. 635, the court in discussing this question and where it was shown that the certificate of stock was held under agreement, in writing, which agreement set out that the stock was held as collateral security, says:

"The simple act of accepting that certificate of stock under an agreement in writing, which as also the entry of the stock in the stock-book the other records of the company relating to the transaction showed that it was held by them only as collateral security, does not make them liable as stockholders, either to the corporation or its creditors. As long as they held the stock under that agreement, doing no other act, their liability to creditors depended upon their legal relation to the company. If stockholders as between themselves and the corporation, they would be liable as such to creditors of the corporation, otherwise not."[33]

§ 66. An assignment absolute in form may be shown to be intended as security only.

It is always competent to show that an assignment or conveyance absolute in form is intended as a security only; and in an action by creditor of a banking corporation against a stockholder to enforce statutory liability, it is held: evidence is proper upon the part of defendant to show that an assignment of stock, absolute upon its face, was in fact given to him as collateral security, and was held by him for that purpose only.[34]

31 Wheelock v. Kost et al., 77 Ill. 296.

32 Hale v. Walker, 31 Iowa 344.

33 Burgess v. Seligman, 107 U. S. 20.

34 Despard v. Walbridge, 15 N. Y. 374; Sturtevant v. Sturtevant, 20 N. Y. 39; McMahon v. Macy, 51 N. Y. 155.

The general rule as laid down however may be stated as follows: A private agreement between the transferrer and the transferee that the former shall not be liable will not relieve him from liability.[35]

§ 67. Statute protecting pledgee.

Where the statute protects the pledgee from liability, the stock if transferred on the stock books of the corporation must show that it is held as pledged property, otherwise the liability will rest upon the party shown to be the owner by the books of the corporation.

§ 68. Individual liability of shareholders of national banks.

The individual liability of shareholders in a national bank arises under section 5151, Revised Statutes of the United States. Which reads as follows:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except that shareholders of any banking association now existing under State laws having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this Title."

A stockholder's liability arises and exists by force of the Statute and is not contractual.[36]

[35] Bells Appeal, 115 Pa. State 88, 2 Am. St. Rep. 532.

[36] First Nat. Bank of Concord *v.* Hawkins, 79 Fed. Rep. 51; Keyser *v.* Hitz, 133 U. S. 138; First Nat. Bank of Concord *v.* Hawkins, 33 U. S. App. 747.

A stockholder's liability is restricted to contracts and debts of the bank which have been contracted in the ordinary course of business.[37]

Where a bank has been placed into voluntary liquidation a stockholder cannot be held for the claims of new creditors.[38]

§ 69. Extent of liability.

A stockholder in a national bank is liable in proportion to the whole amount of the deficit that his own stock bears to the whole amount of the capital stock at its par value.[39]

A solvent shareholder cannot be required under the law to contribute more than his proportion in order to make good the deficiency of an insolvent shareholder.[40]

§ 70. Liable for interest.

The law holds a shareholder liable for the interest on debts of the bank as well as for the principal.[41]

§ 71. Representatives of deceased shareholder liable.

The representatives of a deceased shareholder cannot defeat a liability, though he dies before the insolvency of the bank.[42]

The fact that the title to the stock of a deceased stockholder is vested in an administrator will not relieve the estate from an assessment.[43]

§ 72. Married woman stockholder.

In Vermont (and many other States) a married woman is competent to become a stockholder in a corporation, and to contract to charge her separate property with the payment of any liability which is implied from entering into that relation.[44]

In North Carolina a Code section 1826 provides, that no woman during coverture shall be capable of making any contract to affect her real and personal estate without the written consent of her husband. But the court holds that a purchase of stock by a married woman is not a "contract" within the terms of the statute, and that the wife is liable upon an assess-

37 Richmond *v.* Irons, 121 U. S. 27; Schrader *v.* Mfg's. Nat. Bank, 133 U. S. 67.

38 Schrader *v.* Mfg's. Nat. Bank, 133 U. S. 67.

39 United States *v.* Knox, 102 U. S. 422.

40 Schrader *v.* Mfg's. Nat. Bank, 133 U. S. 67.

41 Casey *v.* Galli, 94 U. S. 673; Richmond *v.* Irons, 121 U. S. 27.

42 Wickman *v.* Hull, 60 Fed. Rep. 326; Richmond *v.* Irons, 121 U. S. 27.

43 Davis *v.* Weed, 44 Conn. 569.

44 Witters *v.* Sowles, 38 Fed. Rep. 700.

ment, though purchased without the written consent of her husband. In discussing this question, the court says:

"To hold that a State law, were there such a law, could except certain shares from the liability, would enable States to defeat the policy of the Federal government in establishing the national banking system. That the Congress has power to establish and legislate for such banks has not, since 1819, been an open question. McCulloch v. Maryland, 4 Wheat. 316. If a purchase of stocks in a national bank by a married woman without the written consent of her husband gives her the ownership of such stock, judgment must be given against the *femme* defendant. If she owned the stock at the failure of the bank, she is liable to the assessment; if she did not, she is not liable. While the Federal government exclusively controls the question of the liabilities of stockholders in national banks, it is not doubted but that a State has power to say that for reasons seeming good to its Legislature, and not in conflict with organic law, a particular class of persons shall not be permitted to own particular classes of property. It may lawfully be provided that a guardian or other trustee may not invest in securities other than those specified by statute. Probably it might be held that a statute might constitutionally provide that purchases by guardians of, say, railroad stock, in the name of their trust, should be absolutely void. In such case it might be held that an attempted transfer of such stock so purchased passed no title; that the stock still remained, although duly assigned and transferred, on the corporation books, the property of the vendor; and that the guardian could recover the money paid from the vendor. It would, I think, require strong and plain words to induce courts to give such a construction to an act of the Legislature." [45]

The law as previously stated is: A married woman may become a stockholder in a State bank where the law of the State in which the contract is made permits it and she will be subject to all the liabilities as such.[46]

A married woman in the District of Columbia may become a holder of stock in a national banking association, and assume all the liabilities of such a shareholder, although the consideration may have proceeded wholly from the husband.

[45] Robinson *v.* Turrentine, 59 Fed. Rep. 554.

[46] Bundy *v.* Cook, 128 U. S. 185.

The coverture of a married woman who is a shareholder in a national bank does not prevent the receiver of the bank from recovering judgment against her for the amount of an assessment levied upon the shareholders equally and ratably under the statutes.[47]

Where one knowingly permits his name to be entered upon the stock books of a bank as the owner, he cannot be permitted as against creditors or a receiver of the bank to show that he was not the owner of the stock, and it is held that he is liable for assessments thereon though he held the stock in fact as trustee for the bank itself.[48]

This is in direct contravention of the law as laid down in the case of McMahon v. Macy, 51 N. Y. 155.

Where a stockholder sold stock several months before the insolvency of the bank, but the transfer was not made on the books until the date of the bank's failure, held, that the stockholder incurred the statutory liability.[49]

But where the stockholder has delivered his certificate of stock with a power of attorney to an officer of the bank, which power of attorney directed him to immediately make the transfer on the books, the owner of the stock will not be held responsible for the failure of such officer to actually make the transfer.[50]

Where stock has been placed upon the stock book in the name of a person with the knowledge of such fact, and he fails to repudiate the transfer to himself, or deny the ownership, he is held liable as the owner of such stock.[51]

Where the by-laws of a bank require that the transfer of the stock shall be registered, where a certificate is issued to a subsequent purchaser in lieu of a certificate of a prior owner, such person will be held liable as a stockholder.[52]

§ 73. Executors, administrators, guardians, or trustees not personally liable.

Section 5152 Revised Statutes of the United States provides: That "persons holding stock as executors, administrators,

47 Keyser *v.* Hitz, 133 U. S. 138; Bundy *v.* Cocke, 128 U. S. 185.

48 Lewis *v.* Switz, 74 Fed. Rep. 381.

49 Richmond *v.* Irons, 121 U. S. 27.

50 Whitney *v.* Butler, 118 U. S. 655; Cox *v.* Elmendorf, 97 Tenn. 518; Hayes *v.* Shoemacker, 39 Fed. Rep. 319.

51 Finn *v.* Brown, 142 U. S. 56.

52 Laing *v.* Burley, 101 Ill. 591.

guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name."

Where the widow of a deceased stockholder of an insolvent national bank, by authority of the will, undertook to settle the estate as executrix without judicial proceedings, but failed to transfer such stock to herself or other person, cannot on the ground that the estate is settled, escape liability as executrix for assessments on such stock to the extent of assets of the estate under her control.[53]

In the case of Lucas v. Coe, 86 Fed Rep. 972, it is held that "A trustee though not appointed by will or an order of the court, or judge, is not personally liable for assessment against stock of an insolvent national bank owned by the *cestui que trust*, but standing in his name where he has been guilty of no fraud, concealment or negligence.

"In fixing the liability for assessment against stock of an insolvent national bank, the effort of the court should be to ascertain who is the actual owner and to hold him, releasing the apparent owner if he has done nothing to deceive or mislead."

Another question not determined by the court, but very strongly leading in that direction is, that proof may be presented to show who is the real owner of the stock.[54]

§ 74. Individual liability of a stockholder in national bank, how enforced.

When the individual liability of the stockholder is to be enforced, the receiver before beginning suit must have authority from the Comptroller of the Currency. It is held that a letter from the Comptroller of the Currency directing the receiver to institute suit is sufficient evidence if not objected to, that the Comptroller has decided to enforce the individual liability of the stockholder.[55]

[53] Baker *v.* Beach, 85 Fed. Rep. 836.

[54] Lucas *v.* Coe, 86 Fed. Rep. 972.

[55] Bowden *v.* Johnson, 107 U. S. 251.

§ 75. Creditor may sue stockholder of state bank corporations.

A judgment creditor who has exhausted his legal remedies against a corporation in California may maintain an action against its stockholders to recover for the benefit of all the creditors who may desire to come in, and be made party, and collect the amount due upon unpaid subscriptions for stock when the corporation neglects or refuses to collect the same.[56]

In Indiana the assignee of an insolvent bank cannot maintain an action to enforce the double liability of shareholders, provided by section 2933 Burns Revised Statutes, 1894 (2684 Revised Statutes 1881). Such action being enforceable only by the creditors.[57]

§ 76. Enforcement of individual liability of shareholders under the National Banking Act.

By an act approved June 30, 1876, section 2, it is provided: "That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

§ 77. When right of action accrues against stockholder in national bank.

A right of action does not accrue against the stockholder holding stock in a national bank until the Comptroller of the Currency has determined that it is necessary to enforce the individual liability.

And the liability of the stockholder can be enforced only in favor of all the creditors.[58]

The Statute of Limitations of a State cannot be pleaded as a bar to an action brought by a receiver of a failed national bank against a stockholder.

56 Baines v. Babcock, 95 Cal. 581.

57 Runner, Assignee, v. Dwiggins, 147 Ind. 238.

58 Gatch v. Fitch, 34 Fed. Rep. 566.

CHAPTER VIII.

BANK OFFICERS AND AGENTS.

§ 78. Directors — general discussion of duties and responsibilities.

The corporate powers, business and property of all corporations formed must be exercised, conducted and controlled by a board of directors.

The office of director is one of the most important connected with a banking corporation. Directors have the general control and government of all its affairs. They are the lawful representatives holding by law the management and direction of all acts affecting the welfare and prosperity of the corporation. The life of the corporation and its business cannot exist or be conducted without a board of directors. They are delegated with certain powers and duties by law which cannot be transferred or conferred upon agents. A director cannot delegate a responsibility which the statute imposes upon him to specially and personally perform. But for the purpose of carrying into execution the usefulness and management of its details in business many of the powers conferred upon the corporation bank may be delegated to agents created by the board of directors. And while this is true, and although they may not be required to perform all the transactions which daily occur, they are bound to know all that is done beyond the merest matter of daily routine.

They are the officers delegated by law with the power to restrain, rule, govern, direct, check, curb, overpower and counteract any and all things affecting the corporation. They cannot pass by-laws, or resolutions, relieving themselves of responsibility, or liability, which the law imposes upon them. Being in control of the powers, business and property, all acts however performed by agents of their creation may become their acts. Agents may exceed their authority or violate the same in such a manner that the directors and the corporation may be excused; but the general principle of law is, that the acts of the agents are the acts of the principal.

The office of a director is one of the most important connected with a banking corporation; but the duties, as a rule, are looked upon as unimportant, and in many cases the neglect of the directors in the performance of their duties brings disaster to the bank.

The failure of directors to perform their duty in the supervision and management of banks has been the direct cause for the arrest, trial and imprisonment of officers for offences committed in their official capacity, which could have been obviated had the directors asserted their power and fully performed such duty.

The duty of a director begins with his election and continues for one year, or until his successor is duly elected and qualified. The faithful execution and performance of all the obligations and requirements of law are so frequently neglected, that to occupy the position of director is one which the occupant himself regards as merely figurative. But such is not the case.

The officers of a bank cannot divest the directors of any power imposed upon them by law. They cannot sell any of the property or real estate of the bank unless duly authorized to do so by resolution of the board of directors. And the instrument of conveyance is not sufficient to pass the title to the property, unless it sets out the fact that it was ordered to be executed by resolution, duly passed by the board of directors.

It has been held that directors have no authority, directly or indirectly, to use any of the funds, or property of the bank, for purposes other than those properly belonging to the legitimate business of banking. They can make no gifts of the corporate property, unless duly authorized by all the stockholders.

No appropriation in any manner of the funds or property of the bank can be made by them, unless it is clearly beneficial and for the material well-being of the bank. They are the guardians of the stockholder, and in reference to the property of the bank are the trustees. If they accept the trust, it is implied that they will use their best efforts to advance and protect the interest of the stockholders. The position being a trust, they are enjoined by law not to use the same in any

manner to the injury and detriment of the stockholders or the bank. They cannot, by resolution, order the sale of real estate or other property at a consideration below its value and buy the same. A director, acting in the position of trustee, cannot make a profit off of the stockholder, who is the *cestui que trust*. They are also liable for losses arising from the direction and mismanagement of the affairs of the bank. Where, however, losses occur which arise from unforseen results or mistakes arising from strictly errors of discretion, they cannot be held responsible.

Upon the question of notice it has been held that when a director is engaged in the business of banking (and being a director signifies an engagement), notice to him is notice to the bank.

It is a well-established principle of law, that if a director takes a part in, or acts for the bank in discounting a note which at the time is known to him to be tainted with fraud or illegality, the bank is affected with this information; and it is not necessary that he should represent the bank. If he is present at the time and is cognizant of such facts, it is held to be notice to the bank.

A director, being a trustee of the property of a corporation, is held while acting as such, especially in savings banks, to a strict account. It becomes his duty to take part in all proceedings held or acts done; while he is present at directors' meetings, he cannot close his eyes and remain passive while his co-directors are wasting by improvident investments the property and moneys of the bank. It is his duty not only actively to oppose measures passed by his associates which are unlawful, but also to invoke the law to restrain its continuance, and through the aid of the law seek to set aside such actions, and recover property and money which has been unlawfully disposed of in such cases.

The law imposes certain duties which are obligatory and from which a director cannot be excused. A failure to perform duties which the laws impose makes the director who wilfully neglects such duty, after being duly qualified in office, liable in civil damages to the person, or persons, injured by such gross neglect.

A director cannot excuse himself from statutory duties, and

grossly ignore the law, which defines the obligation resting upon him.

Where the position is accepted and capital is entrusted to the care, management, or investment under the direction of a board of directors, whose duties are defined, and they wholly, wilfully, and negligently fail in the performance of their duties to such an extent as, through such negligence, results in loss, they become civilly liable.

They may become criminally liable by a failure to observe and comply with mandatory laws enacted by the Legislature. A failure to make a report when required by the statute to be made within a certain time, and at a fixed period, whereby such failure the purpose in non-compliance is to defraud or withhold information which is required to be made public, becomes a criminal act.

It is also a misdemeanor for a director to make false entries in any book, report or statement of the bank, with the intent to deceive the officers of the law.

Where the directors have taken any portion of the assets of a bank, and in violation of law distributed the same as a dividend which the bank has not earned, and where they receive a portion in such distribution, they become civilly liable and their acts may be a misdemeanor. No part of the capital of a corporation can be withdrawn in such a manner.

They cannot in any manner appropriate any portion of the property of the corporation for any purpose other than that duly authorized by law.

The responsibility resting upon a board of directors governing a bank is more onerous than upon a board of directors that may preside over corporations which do not hold, in trust, money belonging to the general public; consequently there is a greater degree of responsibility which the law imposes. This degree of responsibility is created in the very nature of the business of the corporation over which they preside.

Their duties extend beyond the mere fulfillment of the mandatory provisions of the law. They serve more in the capacity of a trustee, and are bound by the principals of law governing that office.

They are an advisory board, and are clothed with power of direction as to all the affairs and workings of the bank.

They are also guardians of the stockholders and the depositors. It becomes their duty to make examinations into the management of the bank's affairs; also to employ such agents as are qualified to conduct a business of such peculiar responsibilities.

They have the selection of the president of the bank, the cashier and other clerks who perform the clerical work, and when selected they become in law the agents of the board of directors; and their acts, if performed within the scope of their instructions, authority, and duties, are the acts of the board which have been simply delegated.

The question of liability of the principal for the acts of his agent is one largely resting upon the facts, but the general principle of law, as is well known and defined, is that the principal is liable for the acts of his agent. A violation of authority by an agent, especially where the party dealing with the agent has knowledge, or has reason to believe, that the agent is acting beyond his authority, will relieve the principal of liability; but if an agent of a banking corporation has been permitted, with the knowledge of the board of directors, to perform certain acts not delegated to him or authorized, which are unlawful, and they have been sanctioned by the directors as between the bank and the party dealing with it, with knowledge, the agent is excused; and the bank held responsible. The directors are, in such cases, personally responsible. The loss does not fall on the bank.

It will be seen that the position of a director in a banking corporation is one of great importance and responsibility.

The board should also understand the liability of the bank to its depositors, and creditors, as well as the character of depositors and borrowers.

The reputation of a bank is made up not only by the character and standing of the officers in charge, but as well from the character of its customers.

The directors should know that the class of business to be encouraged by the bank is of a character that will establish confidence.

It is also a part of their duty to become familiar with the habits of its employees; and if they discover that they are speculating, living beyond their means, or have such habits

as if known to the general public, would bring discredit and possibly ruin upon the bank with the public, it is their duty to dispense with such services at once. It is frequently said as an excuse for retaining an officer whose habits, if publicly known, would bring disgrace upon the bank, that "his ability was unequaled, the bank could not afford to dispense with him. No one in the community could be found to take his place." Such excuses should never prevent a director from doing his duty at once by offering a resolution to vacate the position, and fill it by a person whose character for honesty, truth, and morality has at least never been questioned. Such are some of the unwritten duties or implied laws imposed upon directors of a banking corporation.

The directors of a bank, being its trustees and acting in the relationship of a guardian of its depositors, must never be swerved from doing their whole duty. If they are in possession of facts that an agent or employee engaged by them to conduct the affairs of the bank is an incompetent person, and being incompetent makes losses which they might expect by reason of this incompetency, they have not fully performed their duty. They have been guilty of negligence, which may be of such a degree as to be defined as gross negligence.

The responsibility of conducting a banking corporation is too frequently given over to the manager, president, or cashier of the bank. It does not always abide with the president to make the bank a success, or prevent its ruin and collapse.

If the directors do their duty, success may be easily attained or failure prevented.

Directors should have compensation for their services and may vote themselves reasonable pay for services performed, if authorized by the stockholders, and charge the same to expense; and should be held responsible for the failure of the bank, where it is shown that by reasonable diligence and attention to their duties it could have been by their actions prevented.

§ 79. Directors of national banks.

The sections of the Revised Statutes of the United States relating to the election, qualification, and other duties, powers, and limitations of directors in a national bank, are as follows:

Election of directors.

Section 5145. The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.

Qualifications of directors.

Section 5146. Every director must, during his whole term of service, be a citizen of the United States; and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his office.

Oath required from directors.

Section 5147. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, nor permit to be violated any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him or standing in his name on the books of the association, and that the same is not hypothecated, nor in any way pledged, as security for any loan or debt. Such oath subscribed to by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office.

Vacancies, how filled.

Section 5148. Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

Proceedings where no election is held.

If from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two-thirds of the shares may do so.

The president of the board must be a director.

Section 5150. One of the directors, to be chosen by the board, shall be the president of the board.

A married woman, where the laws of the State permit her to assume the obligations of a stockholder, may also be a director. All the directors may be women.

The Comptroller of the Currency requires that a director must qualify by taking the oath prescribed by the department, which oath when taken must be filed with the Comptroller.

§ 80. Directors of State bank.

The statute of the State wherein the bank is incorporated provides for the qualifications and number of directors required, setting forth the mode of their election, and fixing the term of office; and also prescribes their duties, powers, and limitations; and for what causes they may be removed from office.

A statute defining the duties, powers, and limitations of the directors, is construed as a mandatory statute and not directory.

The directors derive all their powers from the statute and the charter of the corporation; and have no powers other than

the expressed provisions of law, and the charter, together with such implied and incidental powers as are necessary to carry out the purposes of the corporation.

"The best settled conclusion of judicial opinion in this country is that they are general agents" of the corporation.[1]

§ 81. Directors' meetings.

After the directors have qualified, where the laws require such qualification, they are then authorized to carry into effect their duties and powers and the purposes of the corporation. Their meetings, if the time and place are provided for in the charter, must be held at such time and place.

If the charter does not provide for the time and place of meeting, the statute of the State generally designates the manner of calling meetings.

In the absence of a statute, charter, or by-law, providing the time and place of holding directors' meetings, they may be held without the limits of such State if desired.[2]

§ 82. Place of meeting and notice.

When by-laws have been adopted by the bank providing how, when, and where meetings shall be held, a meeting held by the directors, at a time and place in contravention of the by-laws, is illegal.

Notice.

In the absence of a by-law, a personal notice of the meeting should be given to each member of the board. Personal notice may be waived.[3]

Where the statute or by-laws prescribe the mode or manner of notice, a failure to give such notice renders the meeting illegal.

It has been held, however, in the case of American Ex. Nat. Bank v. First Nat. Bank, 82 Fed. Rep. 961, that if the directors of the bank have long pursued an established custom of holding meetings and transacting business at the bank, during business

[1] 61 Pa. St. 202, 48 Vt. 266, 86 Ill. 220; 24 Conn. 591.

[2] Thompson *v.* Co., 58 Miss. 423; Lead Co. *v.* Reinhard, 114 Mo. 218, 21 S. W. 488; Bassett *v.* Mining Co., 15 Nev. 283; Hanna *v.* Co., 23 Ohio St. 622.

[3] Bank *v.* McCarthy, 55 Ark. 473, 18 S. W. 759; B. B. R. Co. *v.* Buck, 68 Me. 81; Library *v.* Association, 173 Pa. St. 30.

hours, whenever a sufficient number were present, the custom would carry with it a standing notice to each director; and enable those present to proceed in the absence of a controlling by-law or statute. The notice is not waived except in the absence of a controlling by-law or the statute.

§ 83. Number necessary to constitute a quorum.

A majority of the board of directors in all the States, possibly with the exception of the State of Oregon, is necessary to constitute a quorum for the transaction of business. The general rule is, that a majority of the quorum has the power to bind the corporation.[4]

Where the statute fixes the number necessary to transact business, any action taken by a less number will be illegal

§ 84. Directors of national banks must act as a unit.

The court in the case of National Bank v. Drake, 35 Kans. 564, in the discussion of the question as to the power conferred upon the directors acting for a national bank, says: "The only powers conferred by statute upon the directors of a national bank are vested in them as a board, and when acting as a unit, and therefore the majority of the individual members of the board acting separately and singly is not the assent of the bank, and is not binding upon it."

§ 85. Board electing officers of bank.

The board of directors is generally empowered by law, and it becomes its duty to elect the officers of the corporation, and employ clerks, and agents of the corporation, fixing their salaries or compensation.

If the statute or charter does not authorize the board of directors to choose or elect the officers, the power lies and is vested in the stockholders.[5]

§ 86. Vacancies in the board.

Where the statute does not expressly provide otherwise, the law implies that a director may hold his office after the term

[4] Ten Eyck *v.* Pontiac, etc., Co., 74 Mich. 226, 41 N. W. 905; Hoyt *v.* Thompson, Executor, 19 N. Y. 207.

[5] Beardsley *v.* Johnson, 121 N. Y. 224, 24 N. E. 380; *Re* A. A. G. Iron Co., 63 N. J. Law 168–357, 41 Atl. 931.

for which he was elected, and until the election and qualification of his successor.

Where vacancies occur in the board, they must be filled as provided for by the statute. In the absence of a charter or statutory provision or a by-law, especially giving the power to the board to fill a vacancy, it can be filled only by the stockholders.

§ 87. Duties which cannot be delegated.

A duty imposed upon the board of directors by the statute to be personally performed cannot be delegated to a committee or agent of the bank.[6]

They may delegate certain powers by the enactment of a by-law or a resolution, and confer thereby executive authority to a committee or an agent; but where the statute or charter of the corporation specifically defines an act or duty to be performed by the directors, they have no power to set aside the law, and appoint agents to do the very things which the law requires them personally to perform.

The general and well established rule is, that all corporate contracts are to be made by the directors.

The directors of a corporation are its chosen representatives, and as such they constitute the corporation, to all purposes of dealing with others. What they do within the scope of the objects and purposes of the corporation, the corporation does.[7]

§ 88. Cannot delegate authority to make discounts.

They cannot delegate, to an officer of the bank, the authority to make discounts, generally; that is, give unlimited power to an officer to loan the funds of the bank to any person or persons who might make application therefor.

It may be stated, that this inalienable duty, which is vested in the board of directors, and which neither by a by-law nor resolution, can be generally delegated to another, is a duty which is more frequently neglected by the board of directors than any other duty imposed by law upon them personally to perform.

The board of directors themselves are frequently ignorant of the law, and their duty in this respect; and just as frequently, the manager or cashier of a bank assumes that the

6 Lyons *v.* Jerome, 26 Wend. (N. Y.) 484.

7 Maynard *v.* Firemans' Fund & Ins. Co., 34 Cal. 48.

right to make loans and discounts for the bank is an implied authority, and the power vests in him as a matter of custom or right.

Following the general rule, that all corporation contracts are to be made by the board of directors, every borrower of the bank's funds who enters into a written promise to pay the bank a sum of money loaned by it to him, has a contract which must be authorized, or ratified by the board of directors.

Upon examination of the principle, and reasons for the rule, it is found to be a safe and sensible law.

The directors are held by a majority of the courts, at the present time, to be the trustees of the funds and property of the banking corporation; and such funds cannot be loaned nor invested without authority emanating from the board of trustees, who are held responsible for them.

The loans and discounts may be authorized, and the executive part of the business performed by the cashier, president, or other agent of the bank; but the officer has no inherent authority in the absence of a resolution or direction coming from the board of directors, to make loans to any person or persons.

In New York in the case of Bank Commissioner v. Bank of Buffalo, 6 Paige Chancery (N. Y.) 497, it is held, that where the board of directors authorized their cashier or president, or any other officer of the bank, to make loans and discounts in his discretion, without having the same passed upon formerly at a meeting of the board, the corporation is liable for a violation of its charter.

The directors may, by a single resolution, authorize the cashier to make loans to a certain person, firm or corporation, up to a certain amount, and in this manner delegate their authority; but beyond this it has been held, that a general resolution passed by the board of directors, authorizing the cashier to discount notes and make loans generally, to those making application, and desiring to borrow, is not within their power or authority.

If loans have been made by an officer of the bank without authority obtained from the board of directors, they may afterward be ratified by the board, and such ratification legalizes the act.

Discounting notes is the principal business of a bank; its resources almost entirely consists of its bills receivable. The deposits of the bank are placed with the bank by the depositors upon an implied theory, that when invested or loaned, they are to be loaned and invested by the trustees or directors with reasonable care and diligence. And the making of the investments for the bank is a duty and an inalienable function belonging to the board of directors.

§ 89. Cannot delegate statutory duties.

The directors cannot delegate any statutory duties imposed upon them by the law to perform. Where they are required to make a report to an officer of the State at periods named by the statutes, as to the condition of the affairs of the bank, and are required to prepare a statement of its condition, they cannot delegate the authority and substitute a statement made by the officers of the bank; and where such a statement is required of them, they must make an examination into the affairs and conditions of the bank, and upon the examination base their statement and report.

Where they are required by law to make a report of the condition and affairs of the bank to an officer of the State, or for publication, and they fail to inform themselves of the condition of the bank, and make a report which is false, they are held personally liable to the stockholders and creditors of the bank.

§ 90. Powers and limitations.

Power to sell property of bank.

The power to sell the property both real and personal of the corporation, when not expressly vested in the stockholders by the statute, is one which the directors alone can carry into effect. This is done by a resolution duly passed at a meeting called for that purpose, or at a regular meeting when a sale of the property of the corporation may be authorized.

The resolution of authority should describe the property to be sold, and the consideration to be received by the bank. It should also direct that the president and secretary of the corporation, in the name of the corporation, be authorized to execute the conveyance. The conveyance should show when

executed that the sale was duly authorized by the board of directors, and that the instrument of conveyance was directed to be made, by the officers, for the corporation. The power to sell and convey property of the bank corporation is vested in the board of directors only.[8]

§ 91. Limitation of power.

No power.

They have no power to increase or diminish the capital stock of the bank in any way except as expressly authorized by the law.

The shareholders alone have the power to order an increase of the capital stock.[9]

§ 92. Assessment of shares — National banks.

The directors cannot order an assessment upon the shares of stock in a national banking corporation, for impairment of capital. The assessment must be made by the stockholders.[10]

§ 93. Directors cannot give away property of bank.

The directors have no power to give away any portion of the bank's property, but the stockholders by a unanimous action may do so.[11]

§ 94. Cannot settle with cashier for his deficits.

They have no power or authority to make a settlement with the cashier whose accounts exhibit a deficit in the funds; but the fraudulent conduct of the director of the bank would not annul nor make it void unless the cashier was also guilty of fraud.[12]

§ 95. Assuming debts of others.

They have no power to assume the debt of a third person, except in case of urgent necessity.

In the discussion of this question the court in the case of Stark Bank v. U. S. Pottery Co., 34 Ver. 144, says:

"The directors had no such power unless under the circumstances there was an urgent necessity of doing it in order to

[8] Gashwiler *v.* Willis, 33 Cal. 11.

[9] Eidmand *v.* Boman, 58 Ill. 444.

[10] Rev. St. U. S., § 5205; Hulitt *v.* Bell, 85 Fed. Rep. 98.

[11] Frankfort Bank *v.* Johnson, 24 Me. 490.

[12] Frankfort Bank *v.* Johnson, 24 Me. 490.

save the credit of the company, and enable them to go along with their business. If there was such necessity making it for the interest of the company to enter into such arrangement, it was within the scope of their powers as directors, otherwise not."[13]

§ 96. Cannot take advantage of position for profit.

The directors are precluded, by the acceptance of the trust, from making any use of their power, or of the corporate property for their own advantage.[14]

The stockholders confer the trust power upon the board of directors, and this power must not be used with a purpose to injure or destroy that interest.[15]

Courts of equity will not permit directors, in the exercise of their duty as such, to make a profit for themselves to the exclusion of the other stockholders.[16]

It is a well settled principle of law that where a director of a bank loaned the money of the bank, and took from the borrower a note running to the bank for the principal sum loaned, at a rate of interest therein stipulated, but at the same time, and as a part of the same transaction, made an agreement with the borrower to permit him to participate in the profits of a purchase and sale of certain lands, it is held that the director will not be permitted to retain for himself the profits thus contracted for, but that such profits must be surrendered to the bank, to be participated in by all the stockholders. No stockholder has the right to use, in any manner, any portion of the funds of the bank to the advantage of himself and as against the rights of the other stockholders.

The directors of a corporation are its chosen representatives, and constitute the corporation for all purposes of dealing with others. All acts done within the scope, purpose, and object of the corporation, by the directors, the corporation does, and are binding. The corporation is bound by the acts of directors in whatever they may do, if done in good faith and without fraud, upon their rights.

13 Seeberger v. McCormick, 178 Ill. 404.

14 Wickersham v. Crittenden, 93 Cal. 17.

15 Wright v. Oriville Mining Co., 40 Cal. 20.

16 Oakland Bank of Savings v. Wilcox, 60 Cal. 126, 93 Cal. 29.

The directors of a bank are prohibited from making an illegal loan, or becoming an accommodation endorser for the bank. But where such transactions appear to be regular, and within the authority of the bank, third parties acting with the bank, without notice of a willful or wrongful purpose, the bank cannot avoid its liability.

But where they borrow money, supposedly for the use of the bank but with the intention to use it for a different purpose, the lender being aware of their intent and purpose, the bank will be relieved from such indebtedness.

§ 97. Discretionary power.

It is held that the directors of a national bank have discretionary power, and it is left within their sound judgment and discretion in the matter of requiring an officer of the bank to give bond.

The same opinion holds that certain special circumstances may arise making them personally liable if they fail to require bonds.[17]

§ 98. Safe rule.

The only safe rule is to require bonds from all the officers and clerks (at least those entrusted with the moneys) of a bank, holding responsible positions. It would seem to be a part of the duty imposed upon the directors, and not a discretionary power to be used at their election. It has been too frequently discovered after a bank has suffered through negligent or criminal acts of its officers, that the opinion or discretion of the directors was worthless.

§ 99. Releasing debt.

The board of directors may release a debt owing to the bank, if by doing so it can be shown that it is clearly an advantage to the corporation.

Touching the same question, it has been held, that where an officer or an employe is in defaut to the bank, the directors may settle with him upon such terms as will best subserve the interests of the bank.[18]

17 Robinson *v.* Hall, 63 Fed. Rep. 222.

18 Jones *v.* Johnson, 86 Ky. 530; Frankfort Bank *v.* Johnson, 24 Me. 490.

§ 100. Releasing subscriber to capital stock.

The board of directors have no power to release a subscriber to the capital stock of the corporation; but if they can make any arrangement with him in settlement without loss to the bank or its creditors, it would seem that they would have the power to do so.

The Supreme Court of the State of Illinois, in the case of McNulta v. Corn Belt Bank, 164 Ill. 427, in discussing this question, says:

"The effect of the resolution and what was done under it was to release the original subscribers to the capital stock from the obligation to pay their subscription. * * * It has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the State, *shall lose any of the benefits of his subscription*. Every such arrangement is regarded in equity, not merely as *ultra vires*, but as unjust to the other stockholders, and to the creditors of the company."

§ 101. Securing preferred creditor.

Where a creditor of a bank has established his debt as a preferred claim, the board of directors may dispose of property to satisfy or secure such a creditor.[19]

§ 102. Removing employes.

The board of directors have the power to remove an officer or employe of the bank, for sufficient cause, at any time. But if such employe is removed from any State bank upon a contract of employment for a fixed period of time, without a good and sufficient cause, such employe may hold the corporation liable.

In the case of Gabriel v. Bank of Suisun, 145 Cal. 266, the Supreme Court says:

"Where after the expiration of an agreement respecting wages and term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term. The Bank of Suisun employed a bookkeeper, for the year 1898, at an annual salary

19 Stevens *v.* Hill, 29 Me. 133; Parker *v.* Carolina Savings Bank, 53 S. C. 583.

of $1,200, payable monthly, and he continued in that employment during the first two months of 1899. He was then discharged and he sued the bank for $1,000, the balance of his salary for the year. There was a judgment of the Superior Court for the amount against the bank, and the Supreme Court has finally decided the case against the bank, saying: 'The presumption arises that the employment was renewed for the same wages and term as for the previous term.' "

Under the provisions of the National Banking Act, the board of directors may remove the officers named in said act, without cause, at any time. A provision of said act, reads as follows:

Fifth. "To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places."

The court, in the case of Taylor v. Hutton, 43 Barb. 195, in discussing this provision of the law, says:

"I think this construction of the act, as having reference to the directors to do these things, and not to the stockholders, is quite plain.

"It does not seem to be at all necessary that any by-laws should be adopted, before a president may be chosen or removed and another appointed in his place. This power is expressly given to the board, irrespective of any by-laws, both by the articles of association and by the act of Congress. Besides, it is a power that might be required to be exercised or that it might be expedient to exercise, prior to the adoption of any by-laws."

The board of directors derive this discretionary power to remove an officer elected by them only when such power is conferred upon them by law.

§ 103. Courts declare that directors are trustees.

The leading authorities in discussing the nature of the office of director in a banking corporation hold, that their position is in the nature of a trust, and they are held to a strict account. The nature of the business over which they preside clearly establishes this relationship. They owe a duty to the public,

to the depositors, and to the stockholders, and they are not permitted by law to acquire any interest adverse to the stockholders of the bank.

As previously stated they cannot make a profit out of the business and withhold, a division from the other stockholders.

The rule of law relating to the duties of a trustee is well established, that he cannot in any manner make a profit from property held by him in trust.

The law will not permit a trustee to prove "an honest intent."

The Supreme Court of the State of California, in the case of the Farmers and Merchants National Bank of Los Angeles v. John G. Downey, 53 Cal. 466, where it was shown that one of the directors of a bank loaned the moneys of the bank, and took from the borrowers a note running to the bank for the principal sum loaned, but at the same time and as a part of the same transaction, made an agreement with the borrowers, that they should permit him to participate with them in the profits of a purchase and sale of certain lands,— held that the director could not be permitted to retain for himself the profits thus contracted for, but must surrender them to the bank to be participated in by all the stockholders. The court in discussing their relationship to the bank, says "He was its trustee." The court again says, "The directors are the trustees and are managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of a Court of Equity, be suffered to pass without a remedy."

§ 104. Misappropriating bank funds.

A director of a bank cannot use or appropriate any of the funds of the bank, to retain or pay an attorney to defend him in a suit brought by a stockholder against him.[20]

§ 105. Rights of directors.

May borrow money from bank.

The law does not, unless by special provision, refuse to a director the privilege of borrowing money from the bank over

[20] Percy *v.* Millandon, 3 La. 568.

which he presides. The statutes of many States have, however, enacted inhibitive provisions, upon this subject, in so far as savings banks are concerned, and will not permit a director either directly or indirectly to borrow from his own bank. The National Banking Law permits a director to borrow as any other customer, but specifically provides, that no person shall be permitted to borrow to exceed one-tenth of its capital actually paid in.

Where there is no prohibition to borrow, his application must be treated as the application of a stranger, and he is excluded from using his influence to secure the loan with the other members of the board; and from voting upon the application. It is not necessary that he should withdraw his presence from the room, but he must take no part or action relating thereto.

When the law prohibits a loan to a director, and one is made in violation of the charter or statute, the bank may collect the same.

In the case of Britain v. Oakland Bank of Savings, 134 Cal. 282, the court in discussing this question says:

"At the time of the transaction between Bowman and the bank he was a director in the bank. The Civil Code declares that no director or officer of any savings and loan corporation must directly or indirectly for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation. And declares that the office of any director or officer, who acts in controvention of this provision of the law, shall immediately thereupon become vacant. * * * The obvious purpose of this section of the code invoked and relied upon was to protect savings banks and their depositors. To hold therefore, that if the deposits or funds of such a bank should be borrowed by any of its officers, directly or indirectly, no action could be maintained by the bank to recover the money, would often work a great injustice and wrong. The bank therefore could have sued Bowman to recover back the money loaned."

If a loan or discount is knowingly made for the benefit of a director of a bank or of a firm with which he is connected in interest or as a co-partner, it is held to be a loan or discount to such director within the intent and meaning of the statute

limiting the amount of loans and discounts to directors of banks.[21]

Some of the States have enacted laws limiting the amount which may be loaned by a bank to any one person, firm, or corporation; and many of the States have enacted laws prohibiting officers and directors of savings banks from directly or indirectly borrowing any of the funds of such bank.

The statute of California is silent upon the rights of directors to borrow from commercial banks over which they preside.

A director has the right to examine the books of the corporation at any time, and cannot be excluded by a by-law which may deny this right to him. The right is a personal right, belonging to his office; and a by-law, which may attempt to fix a time for the examination of the books of the corporation in so far as it affects the rights of a director is unconstitutional, and invalid. If the right is denied him by the other directors, or officers of the bank, to examine the books, he may apply to the court for a writ of mandamus.[22]

§ 106. Notice to the board.

The general rule as to what constitutes notice to the board may be stated as follows:

The board as such is charged with notice of a matter when assembled at a meeting, and a member or other person discloses or mentions a matter. The fact that they, as a board, do not at such meeting discuss the matter presented to them, makes no difference. The matter has been sufficiently presented when mentioned at a meeting and they are bound by such a notice.

If they have received notice of a matter which should be immediately acted upon, and they fail to act, and a loss occurs to the bank through such failure, they are liable.

The rule above stated, is fully supported by the court in the case of Bank of Pittsburgh v. Whitehead, Sproul & Co., 10 Watts (P. A.) 397, where the court in discussing the question says:

"Publication of dissolution in a newspaper, taken by the officers, and paid for by the bank, may not be constructive notice to a bank which had, as in this instance, previously

21 Bank Commissioners *v.* Bank of Buffalo, 6 Paige, Chy. (N. Y.) 497.

22 People *v.* Throop, 12 Wend. (N. Y.) 183.

dealt with the firm; but when the fact of dissolution, gleaned from that, or any other source, is stated before the board by a member of it, and made a subject of conversation during the very transaction, it is impossible to doubt that the bank is to be affected, because knowledge of the fact material to be known is a part of the *res gestæ*. There cannot be a question, therefore, that knowledge imparted to the board, as was done here, by a director at a regular meeting, is notice to the bank."

§ 107. When the law imputes knowledge.

It is held by the Court of Appeals of the State of Missouri, that where directors have had, for many years, complete management of a bank, they are imputed by law to know of its condition and are therefore charged with knowledge of its insolvency.

The Supreme Court of the United States, in the case of Martin v. Webb, 110 U. S. 7, says:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

§ 108. Notice to a director.

The general rule is that the bank has notice if the director receives or acquires the notice in his official capacity, or if acting as agent, or attorney in charge of a matter for the bank. His knowledge is, then, knowledge to the bank.

The Supreme Court of the State of Massachusetts holds that if a director of a bank, who acts for a bank, in discounting a note, has knowledge that the note was procured by fraud, the bank is affected with his knowledge. The court says:

"But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank and

the bank is affected with his knowledge. A bank, or other corporation, can act only through its officers, or other agents. As in other cases of agency, notice to the agent, in the course of a transaction in which he is acting for his principal, of facts affecting the nature and character of the transaction, is constructive notice to the principal." [23]

Where, however, a note is discounted by a bank, the mere fact that one of the directors knew the fraud, or illegality, will not estop the bank from recovering.[24]

It is held in the case of National Bank v. Norton, 1 Hill (N. Y.) 572, that notice of dissolution, published in a newspaper, and thus accidentally reaching a bank director, is not equivalent to actual notice to the bank, especially where, by the provisions of the charter a director has not power to act for the institution, save in conjunction with others. In discussing the question of notice, the court says:

"He happened to know the fact of dissolution, as a director or other corporator may do, without perhaps being aware that the bank could be prejudiced by it. Not having any intimation that it was material, it is too much, even if the point were in the case, to insist on a presumption that he ever communicated the fact to the board. Not having acquired his knowledge as director, there is no room for presumption either on the ground of duty or interest. In The Fulton Bank v. Benedict, 1 Hall (N. Y.) 480, 497, 557, the judge told the jury that notice to a director who appeared to have had charge of the business to which it related was not notice to the bank, unless communicated to the board, or to the officers of the bank. Oakley, J., said the charge was too narrow for the case; adding, 'I think that under some circumstances, notice to a director ought to charge the corporation, as where the director acts in any particular business as the special agent of the bank, as in the case of Rathbone. He was one of a committee to inquire as to this very notice,' etc. The Washington Bank v. Lewis, 22 Pick. 24, 31, takes the same view of a director's agency. In the Hartford Bank v. Hart, 3 Day, 491, 5, the court said, 'The

[23] Suit *v.* Woodhall, 113 Mass. 391; Bank of U. S. *v.* Davis, 2 Hill 451.

[24] Commercial Bank *v.* Cunningham, 24 Pick. (N. Y.) 270; Washington Bank *v.* Lewis, 22 Pick. (N. Y.) 24.

directors have certain powers resulting from their act of incorporation, and are, for certain purposes, agents, and their acts, when in strict relation to their agency, are binding on the corporation.' See also Stewart v. Huntington Bank, 11 Serg. & Rawle, 267, 269, and Hayward v. The Pilgrim Society, 21 Pick. 270. These cases show, what is indeed quite plain, that the acts of a director or other officer of a corporation, unless official, or in respect to his agency, are no more operative as against the institution than the acts of any ordinary corporator; and these no more so than the acts of a stranger.

"In the case at bar, the learned judge held that proof of publishing the notice, and actual knowledge in the director whose duty, as one of the board, it was to pass on the discount and renewal of notes, and who was therefore to be regarded as the agent of the plaintiffs, was sufficient proof of their knowledge. In this we think he erred. The board were the agents for the purposes mentioned, and they should acquire this sort of knowledge as such, or at least the firm should show notice brought home to some other agent specially authorized by the bank, or by the course of their business, to receive it."

In the case of Fairfield Savings Bank v. Chase, 72 Me. 226, it is held that a notice to a bank director, or trustee, or knowledge obtained by him, while not engaged either officially, or as an agent or attorney in the business of the bank, is inoperative as a notice to the bank. The rule, as laid down in this case, is stated as follows:

"A single trustee or director has no power to act for the institution that creates his office, except in conjunction with others. It is the board of directors only that can act. If the board of directors or trustees makes a director or any person, its officer or agent, to act for it, then such officer or agent has the same power to act, within the authority delegated to him, that the board itself has. His authority is, in such case, the authority of the board. Notice to such officer or agent, or attorney, who is at the time acting for the corporation in the matter in question, and within the range of his authority or supervision, is notice to the corporation."

In California, in the case of Balfour v. Fresno Canal Co., 123 Cal. 395, the rule is laid down as follows:

"A corporation must be presumed to have full notice of all

the facts which are known to its president affecting its interest. It is his duty, as the head of the corporation, to report the same to the trustees, and it is usually conclusively presumed that he has done so."

The court says: "The president of a corporation is the proper person to whom notice which is to affect a corporation is to be given. The corporation has no ears, eyes, nor understanding, save through its agents. The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interest of the corporation. And the presumption is that he does so. Usually this is a conclusive presumption."

The question is again discussed by the court in California, in the case of McDonald v. Randall, 139 Cal. 246.

The case was tried on an appeal from the Superior Court of Humboldt county. The lower court found the following facts:

"That the said Randall Banking Company purchased said note and mortgage in good faith and in the ordinary course of business, and for value before its maturity and in ignorance of the fact that as to Margaret H. McDonald it was given without consideration, or for a debt, which was barred by the Statute of Limitation."

The Supreme Court in its opinion says:

"This finding, if sustained by the evidence, is determinative of the case against the appellants. It is contended, however, that this finding must be held to be unwarranted, because it appears, and the court found, that Randall was the president of the bank and knew of the consideration of the note. But when he procured the bank to take the note as part payment of his indebtedness, he was acting individually and at arm's length to the bank, and his knowledge was not the knowledge of the bank. The same may be said of the former secretary, Murray, who was absent when the bank acted in the matter of accepting the note and mortgage, and who obtained his knowledge while acting for Randall individually; and also of Roberts, who was elected secretary on the day the bank acted, and who presented the note and mortgage to the bank for and as agent of Randall. The note and mortgage were accepted at a meeting of the board of directors of the bank, at which were present Hill, the vice-president, and four of the other directors, Ran-

dall not being present. Neither Hill nor any other of the directors knew that the consideration of the note was an outlawed indebtedness. The fact that some of them knew, or should be held to have known, that shortly before the making of the note and mortgage the property covered by the mortgage had been conveyed to the plaintiff by her husband — it formerly having been community property — and that the conveyance had been recorded, is of no significance. The validity of the transaction here involved was in no way dependent upon the time at which she acquired title to the mortgaged premises. That a corporation is not chargeable with the knowledge of one of its officers or agents who is acting on his own behalf, and not for the corporation, is beyond question the law. Sufficient authorities are cited to the point in Bank v. Burgwyn, 110 N. C. 267. It is there said, among other things: 'In such transactions the attitude of the agent is one of hostility to the principal. He is dealing at arms length, and it would be absurd to suppose that he would communicate to the principal any facts within his private knowledge affecting the subject of his dealing, unless it would be his duty to do so, if he were wholly unconnected with the principal. As was said by the court in Wickersham v. Chicago Zinc Co., 18 Kan. 481, 'Neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself and deals with the corporation as if he had no official relations with it;' or, as was said in Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33, 'His interest is opposed to that of the corporation, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it.'

"We are of the opinion that the finding above discussed cannot here be disturbed; and therefore it is unnecessary to consider any other point argued by respondents."

In Illinois, in the case of First Nat. Bank of Monmouth v. Dunbar, 118 Ill. 625, it is held that where a cashier purchases bonds for a customer of the bank, and receives the bond on special deposit, he acts as agent of the bank. And if, to hide an embezzlement, he takes such bonds from the special deposit, and places them among the assets of the bank, his knowledge is the knowledge of the bank, and the bank cannot acquire a

legal title to the bonds without the knowledge or consent of the true owner.

The rule is again stated, as follows:

"Notice to an agent of a bank, or other corporation, entrusted to the management of its business, or of a particular branch of its business, is notice to the corporation, in transactions conducted by such agent acting for the corporation within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing or on some prior occasion." [25]

In Mississippi, notice to a bank clerk of matters not under his charge is not notice to the bank.[26]

Notice to a cashier that bank funds have been loaned is notice to the bank.[27]

In Massachusetts it is held that the cashier's knowledge of fraud in a note is notice to the bank.[28]

It is held in the case of Seneca Co. Bank v. Neass, 5 Denio, 329, that knowledge obtained by the cashier outside of his duties is not notice to the bank.

In the case of National Security Bank v. Cushman, 121 Mass. 490, the court holds, that when a director of a bank, who acts for the bank in discounting a note, has knowledge that the note was procured by fraud, the bank is affected with the knowledge.

A bank is bound to take notice of a power of attorney given by a third person to its president.[29]

§ 109. Director must have actual knowledge.

In the case of Mann v. Sec. Nat. Bank of Springfield, 34 Kan. 746, it is held, that:

"A corporation should be held to have constructive notice of only such facts as have been brought to the actual notice or attention of some one of its officers or agents, or of such facts only as have been constructively brought to the notice or attention of some one of its officers or agents by the actual notice of such other facts as would naturally put the officer or

[25] Cragie v. Hadley, 99 N. Y. 131; Smith v. Board et al. Co., 38 Conn. 208.

[26] Goodloe v. Godley, 21 Miss. 233.

[27] New Hope, etc., Co. v. Phœnix Bank, 3 N. Y. 156.

[28] Fall, etc., Bank v. Sturtevant, 66 Mass. 372.

[29] Mechanics Bank v. Schaumberg, 38 Mo. 228.

agent upon inquiry; and therefore, held, where none of the officers or agents of a bank had any actual notice of any infirmity of a note purchased by the bank but one of the directors who was also a member of the discount committee of the bank was the president and general manager of another corporation, one of whose agents, not the president and general manager, had actual notice of an infirmity of the note, such as would require the agent's own corporation to take constructive notice of such infirmity, the bank may nevertheless be considered as an innocent purchaser of the note without notice of any infirmity affecting it, notwithstanding the fact that the other corporation had constructive notice through its agent of such infirmity."

A bank is not chargeable with the knowledge which a director has acquired, in his individual capacity, as to paper offered for discount, and which he does not disclose. And where as a director he does not discount the paper himself, as an officer or agent of the bank.[30]

§ 110. When director is chargeable with knowledge as against himself.

"Knowledge of the corporate officer or agent will not be imputed to the corporation where the fact is one which the officer or agent is interested in concealing from it, except in cases where a contrary rule is necessary to save the rights of innocent third persons." [31]

§ 111. Directors' liability.

The well known and established rule of law is, that the directors must manage the business of the bank, as directed by the law and the bank's charter. And if they fail to perform their duty in good faith, they will be held liable for the losses to the stockholders and creditors.[32]

They are liable where they fail to use ordinary care in the inspection of the books of the bank.

The directors may commit the ministerial work of the bank to officers duly authorized to perform the same, but this does

[30] 49 Mich. 384.

[31] Cyclopedia of Law & Procedure, vol. 10, p. 1064.

[32] Solomon v. Bates, 118 N. C. 311, 24 N. E. 478; Bank of St. Mary's v. St. John's, 25 Ala. 566.

not absolve them from the duty of reasonable supervision or shield them from liability for the wrong-doing of such official, if through gross inattention the wrong-doing has escaped their notice.[33]

They are not excused from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross negligence.

They must use ordinary care, and ordinary care is something more than officiating as "figure heads."[34]

§ 112. Degree of care.

The degree of care required of a director, the Supreme Court of the U. S. says:

"Depends upon the subject to which it is to be applied. Each case is to be determined in view of all the circumstances."

Where the statute expressly provides that a dividend shall only be declared from the profits or surplus funds of the bank, and the directors in ignorance of the law, declared a dividend which impaired the capital stock, they are liable to the stockholders. Ignorance of, an express provision of law, does not excuse a director.

But where a dividend is declared, from the assets which prove to be only bad judgment, and not bad faith, they are not liable.

In the case of Witters Receiver, etc. v. Sowles, 31 Fed. Rep. 1, the court says:

"Bank directors cannot be held personally liable for money paid out for dividends to a greater amount than net profits, after deducting losses and bad debts (Rev. St. U. S. 5204), because these were debts, bad in fact but supposed to be good when the dividends were declared and paid.

Bad judgment on the part of the directors, as to the condition of the assets, without bad faith, does not make them individually liable."

§ 113. Acting in good faith.

They will not be held liable when acting in good faith and under a mistake of law. If they act in ignorance, and where

33 Wheeler v. Aiken Co. Loan & Sav. Bank, 75 Fed. Rep. 781.

34 Briggs v. Spalding, 141 U. S. 132.

their acts are directed and authorized by counsel employed by them.

It is their duty to know the express provisions of the statute which define their power, and for a violation of all such acts however committed by them, they will be held liable.

§ 114. Directors declaring a dividend.

The general rule as to the liability of the directors in declaring a dividend, is laid down by Cooke on Corporations, he says:

"Where the directors declare a dividend in good faith and without negligence, they are not to be held liable, merely because the dividend turns out to have impaired the capital stock."

But where the directors place fictitious values on the assets in order to declare a dividend, such directors are liable.[35]

A director cannot be held liable for a dividend declared at a meeting when absent or of which he had no notice, and he may be relieved from liability if present, by declaring and voting against the declaration of such illegal dividend.

An illegal dividend declared out of the capital stock, in violation of law, and paid by the directors, is a misdemeanor.[36]

The statutory liability of directors in an Oregon corporation for declaring dividends, out of the capital stock, is a penal liability.[37]

§ 115. Excuses of directors.

Ill health is held to be no excuse for a failure to perform a duty, especially when at the time of election as a director, he as such director accepted the office; but where a director of a national bank is seriously ill, it is within the power of the other directors to give him leave of absence for a term of one year instead of requiring him to resign. And if frauds are committed during his absence and without his knowledge, whereby the bank suffers loss, he is not responsible for them.[38]

The fact that a director is a non-resident of the State does not excuse him for false statements sent out by the bank.

[35] Cockrill v. Abeles, 86 Fed. Rep. 505.

[36] Vercontere v. Golden State L. Co., 116 Cal. 410.

[37] Patterson v. Wade, 15 Fed. Rep. 770.

[38] Briggs v. Spalding, 142 U. S. 132; German Sav. Bank v. Wulfekuhler, 19 Kan. 60.

This question, with others, is discussed at length in the case of Houston v. Thornton *et al.* 29 S. E. 827, and in view of the importance of this subject we cite from the opinion of the court the following portion:

"The issues tendered by the defendants presented the question whether there had been fraud and misrepresentation on the part of the defendants. Those settled by the court at the close of the plaintiff's evidence presented the enquiry whether there had been negligence and wrongful acts by which the plaintiff had been damaged. The latter were proper upon the pleadings. The plaintiff complained that the board of directors of the Peoples' National Bank, among whom were the defendants, in February, 1890, and at sundry other times before and after, caused to be published reports of the status of the bank, which showed it to be amply solvent, whereby the plaintiff was induced, in April, 1890, to purchase eleven shares of the capital stock of said bank, whereas at the times aforesaid the bank was hopelessly insolvent, and had been so for at least five years; that the said directors either knew this to be the true condition of the bank, or with proper care could have known it. The complaint is full, and contains a detailed statement of the acts of negligence alleged against the defendant. The bank was declared insolvent on the 31st of December, 1890, and the receiver took charge in February, 1891. The plaintiff not only lost the whole sum ($1,100) invested in the purchase of said eleven shares of the stock of the bank, but under the liability clause of the national banking act has been assessed 50 per cent. on her stock, and a judgment has been obtained against her by the receiver for $550 on that account in the Federal court. The published statement of the bank, January 2, 1890, showed that the capital stock was $125,000, the deposits $87,300, the surplus $32,000, and undivided profits $6,795. The former cashier of the bank testified, without contradiction, that this statement was made by the order of the directors; that it was untrue; that there was no surplus, no undivided profits, and that the bank did not even have its capital stock; that, if the directors had examined the papers, they would have known the insolvency of the bank; that at that time the president (Moore) owed the bank between $100,000 and $120,000; that one of the directors (Thornton)

owed the bank about $40,000, another director McNiell owed it $20,000, and Starr, another director, owed it between $6,000 and $7,000,— thus between $166,000 and $187,000 being due the bank from these officials, of whom McNeill was then known to be insolvent and failed in November, 1890, and Thornton in the spring of 1891; that the bank never had a finance committee; that in November, 1889, Moore owed the bank on his unsecured paper $100,000, of which $30,000 had been due three to ten years. It is needless to go through the evidence, which shows the most culpable negligence on the part of the board of directors, for this is sufficiently shown by the above-recited facts if nothing further had been proved. At the meeting of the directors on January 14, 1890, a dividend of 4 per cent. out of the profits was declared, all the directors being present, and the defendants voting for the declaration of the same; though this dividend, like all the other semi-annual dividends for the five years previous was in fact paid out of the deposits, and not out of the earnings.

The defendants asked the court to charge:

1. "That upon the facts in evidence the plaintiff cannot recover, because of any negligence of the defendants, they being directors of a national bank in the hands of a receiver, becomes an asset of the bank, for which the receiver alone can sue, and the jury will therefore answer the second issue 'No.'" This prayer was properly refused. The wrong complained of is not one toward the company, not any negligence in the duty to guard its interests and to comply with the requirements of the National Banking Act, but a wrong to the plaintiff in permitting a false and fraudulent statement of the condition of the bank to be published, whereby the plaintiff, trusting in the truth thereof, and the high character of the defendants, was misled into parting with $1,100 for the purchase of eleven shares of the capital stock of the company, which at that time was worse than worthless. This is not a cause of action that, under any circumstances, could have passed to the receiver. 3 Thomp. Corp. §§ 4132, 4144, 4304. If this action had been brought by a depositor "the settled doctrine of the law is that if, in the pretended performance of duties imposed upon them by law, the directors of a bank used their official station to make false representations which are believed and

acted upon by third parties, they are liable to respond for the injury done to the one defrauded thereby, and that the liability provided for, in the National Banking Act cannot be deemed to preclude the right to maintain a common-law action for deceit for such false and fraudulent representation." Prescott v. Haughey, 65 Fed. Rep. 653, 659, which distinguishes Bailey v. Mosher, 11 C. C. A. 304, 63 Fed. Rep. 488; Delano v. Case, 121 Ill. 247, 12 N. E. Rep. 676; 3 Thomp. Corp. § 4304. The allegations and proof as to declaring dividends out of deposits, and allowing an official to borrow more than one-tenth of the capital stock, are not the basis of this action. If they were, then the receiver should have brought the action; but they are merely evidential to show the negligence whereby the plaintiff, not the bank, was injured, and to support her action for the injury to herself.

2. "That the plaintiff cannot recover unless the jury shall believe from the evidence that the defendants participated in the fraudulent statement made by other officers of the bank; and unless the plaintiff has shown such participation, the jury will answer the second issue, 'No.'" Refused, and the defendants excepted. There was no error in refusing this prayer. The ground of recovery is not the participation of the defendants in fraud, but that, by their gross negligence, they permitted the statements to be put forth upon their authority showing the bank to be amply solvent, with large surplus, and the declaration of 4 per cent. semi-annual dividends out of profits, when there had been no profits, as to all of which the defendants should have been informed. It was in evidence, and not denied, that all the directors were present when the dividend of January, 1890, was declared, and Starr alone voted "No," as to whom a non-suit was entered. As was said in Solomon v. Bates, 118 N. C. 311, 24 S. E. 478, and reaffirmed in same case, 118 N. C. 321, 24 S. E. 746, and Caldwell v. Bates, 118 N. C. 323, 24 S. E. 481: "If false and fraudulent statements of the condition of the corporation are put forth under the authority of the directors, it is not necessary that they should know them to be such. It is their duty to know them to be true, and they are liable for damages sustained by any one dealing with the corporation, relying upon the truth of such reports." 1 Morse, Banks, §§ 132, 137;

Kinkler v. Junica, 84 Tex. 116, 19 S. W. 359. So salutary and just a rule is supported by ample authority elsewhere; and, if it were not, it is correct in itself, and a just protection, to which the public are entitled. It is not necessary, as the defendants asked the court to instruct the jury, that these defendants "participated in the fraudulent statements;" but, if the statements were given to the public by the authority of the board of directors (which is not controverted), and were in fact false and fraudulent, and the plaintiff relying thereon (as she had a right to do), was induced to buy stock, or had made deposits whereby she suffered injury, all the directors are liable whether they "participated" in the fraud or not. Arnison v. Smith, 41 Ch. Div. 348; 3 Thomp. Corp. § 4108.

§ 116. Compensation of directors.

The general rule is that directors of banks are acting as trustees and as such are supposed to serve without compensation.

A governing statute may allow them to regulate their own compensation; but in the absence of a statute or by-law their services are supposed to be gratuitous.

They cannot recover compensation for doing what they should have done as directors.[39]

They cannot vote themselves salaries. Such a resolution is void, as being a promise without a consideration.[40]

They cannot vote themselves a compensation for services already performed.[41]

They may recover for services, however, which are rendered outside of their duty.[42]

It is claimed they may recover for services rendered prior to organization.[43]

Such services may be recovered for if authorized by a majority of the shareholders.[44]

39 Brown v. Valley View Mining Co., 127 Cal. 630, 66 Pac. 424; Brown v. Republican Mountain Silver Mines, 17 Colo. 421, 30 Pac. 66; Brown v. Beck, 83 Ga. 471, 10 S. E. 121.

40 Gardner v. Butler, 36 N. J. Eq. 702.

41 Blue v. Canfield Nat. Bank, 145 Ind. 518, 43 N. E. 655.

42 Bassett v. Fairchild, 132 Cal. 637; Fitzgerald, etc., Coast Co. v. Fitzgerald, 137 U. S. 98.

43 Mobile Branch Bank v. Collins, 7 Ala. 95; Allerton First Nat. Bank v. Hoch, 89 Pa. St. 324.

44 Tift v. Quaker City Nat. Bank, 141 Pa. St. 550.

CHAPTER IX.

THE PRESIDENT.

§ 117. General qualifications.

The executive business of a bank is conducted by its president, vice-president, cashier and secretary. They having been duly elected or appointed by the board of directors, as the law may require, assume the management and conduct its affairs.

The president of a bank should be educated. He must have obtained at least a liberal education. He should be able to speak and write the English language fluently and correctly.

It may not be considered necessary in the successful management of a bank, that the president or managing officer should have graduated from a university, but it cannot be said of a president of a bank who has matriculated that his attainments and distinction as a scholar are a detriment to him in his profession as a banker. The deeper his education and training are laid in youth, the broader his comprehension and ability to preside in his profession. He should be able to speak well that he may be correctly understood, and write well, so that the meaning of his words cannot be misconstrued. To be concise and accurate in his speech and correspondence forms a very important part in the management of a large bank. There are numerous instances where the correspondence has been loosely prepared, possibly having a double meaning, which has brought litigation and loss to the bank. It must be borne in mind that the statements either verbally made or reduced to writing by an officer of the bank, while in charge of its business, are binding upon it; and the stockholders may be held liable. An officer being in charge of the affairs of a bank, and directing its business, is sufficient presumption of authority to bind the bank; and the representations of the president of a bank made in transacting its business are admissible in evidence against the bank, but statements made by him away from the bank, and in which the bank has no interest, are not admissible in evidence against the bank.

The duties of a president, as his office indicates, are executive. He should preside at all meetings of the board of directors; and upon such occasions it frequently becomes necessary to formulate an important document, to draft a preamble or resolution. These meetings are usually, if not always, secret sessions; and the business is therefore secret and the president of a bank should at least have such an education as would qualify him for this work.

It is an erroneous opinion which is held by some, that a preparation or education for the profession in the management of a bank is unnecessary. To say that a banker "should have some preparation for his work" is not a sufficient qualification, or the standard, which is required in the race for prominence and success. "Some preparation" does not qualify the mechanic in the construction and building of the perfect engine, which hauls the great passenger trains that are filled with precious lives.

A banker is like the educated and trained pilot, and, when a financial storm sweeps over the country, he should be at the helm; his training and preparation for his work will then prove a storehouse of wealth, and his bank, otherwise properly guarded, cannot be foundered.

To be the trustee of the stockholder and the guardian of the people's money is a responsible position, and ignorance should not be crowned as manager to execute such trusts.

It is no uncommon thing to learn after a bank has failed that it was caused by the officers using and speculating with the bank's funds, or permitting the use of the same by others in violation of law.

I believe the records will justify the statement that 50 per cent. of all bank failures are brought about in this way. A bank officer should not be a speculator, or become directly or indirectly a partner in speculations in connection with his depositors. If he is engaged in outside interests there is serious danger that he will neglect the interests of the bank. A banker who is a speculator, without any previous thought of wrong or injury to the bank, becomes himself a heavy borrower of the bank's funds. There being no restriction or limitation as to the amount he may borrow, he finds it a very easy matter to give his note and take the money. He has all confidence in

his ability to replace the accommodation at any moment: but he seldom calls upon himself to pay back money so easily borrowed, and reverses set in. His judgment proved bad, and finally a general depression sweeps over the country and the bank fails. What is the cause?

The practice is dangerous. It should be stopped. There is precedent after precedent where bank officers have granted to themselves unlimited credit in their own bank, or to others with whom they were interested in business, which caused ruin to depositors and stockholders alike.

It is said that no law is a barrier to those who intend to disobey it, but there is no criminal who does not contemplate the force and effect of the law, and if a strict limitation prohibiting such accommodations were upon the statute books, it would be the means of saving many banks from ruin and future insolvency. It is argued by some that such strict limitations should not be enforced against the bank officers by legislative action, but should be placed in the hands of the directors. That they are better qualified to determine the ability of the borrower to repay, than the law which would fix by arbitrary legislation a limit upon his credit. Upon this question there are various and interesting opinions, from our best financiers; but many leading bankers who have given this subject unprejudiced consideration are almost unanimously in favor of restricting, or limiting, the amount an officer or other parties can borrow from his own bank. Several States have put themselves on record and have enacted such a law. The National Banking Law has never been construed upon this question to operate as a barrier to business. Neither has it had the effect to deter honest and intelligent men from serving as directors.

The president of a bank should be qualified to preside over the bank, and he should not delegate his responsibility or authority to the cashier and reply, if disaster comes (as it may if he fails in the performance of his trust), "I could not prevent the crisis. The cashier failed to give me notice of the dangerous condition of matters until it was too late." It is his duty to know the condition of the bank, and when the storm is on he should be at the helm. To be the trustee of

the people's money is a responsible position, but if accepted it should be faithfully executed, and criminal negligence, omission of duties, and carelessness should not be excused.

A successful bank will have at its head a man who is always at his post; one who will as faithfully guard the treasure of those confiding in him as he would his own.

The management of banks is too frequently left in the hands of their cashiers, the president having been selected for his wealth or social standing. Every officer and employee engaged should be laborers, acquainted with all the details of their business, and interested in all matters pertaining to the prosperity of the bank.

A bank president should know his customers, the strength and weakness of those to whom money is loaned, or who are likely to ask for loans. The bank's prosperity depends largely on the sagacious lending of its resources.

A successful bank president should make a practice of frequently examining into the condition of the bank's affairs, making a searching and thorough examination, taking off a balance, counting the cash, and generally making a careful inspection of all the books. If this practice is maintained, employees will seldom, if they are so inclined, attempt malfeasance. A bank that has for its president one that will faithfully follow this practice, if otherwise judiciously managed, should never be compelled to go into involuntary liquidation.

§ 118. Qualifications necessary to hold office.

The national banking laws specify the qualifications required of directors serving as such for said association, and section 5150 of said act requires that "one of the directors to be chosen by the board shall be the president of the board."

In all of the States statutes are enacted designating certain officers that corporations must have, and providing that such officers shall be elected by the board of directors. In the absence of such statutes placing the power in the directors to elect officers, the current of authority is that the power then lies in the stockholders.

The statute of the State providing that an officer shall be selected from the stockholders is mandatory.

§ 119. The president's powers.

The president having been duly elected to preside over the bank, derives his powers from the law governing corporations and the bank's charter, the by-laws, and the authority vested in him by the board of directors. When chosen he becomes the presiding officer of the board, and *ex officio* is president of the bank. His position, however, does not give him extraordinary powers or authority greater than any other director.

As president of the board of directors it becomes his duty to preside at all meetings held by them, and as such presiding officer he is authorized to call the meeting to order, puts all motions presented for adoption; and is entitled to vote upon every question presented; and have his vote recorded in like manner as other directors. His position and election as president of the board does not make him the chief managing agent of the bank. This power may be conferred upon him, but is not established by his selection as president of the board of directors. The office of president of the board does not carry with it inherent power as the chief executive or managing agent of the bank.

The charter may prescribe that the president of the board of directors shall be the chief executive and managing agent of the bank. In the absence of such power in the charter, the by-laws of the bank when duly adopted may confer upon him enlarged powers, particularly designating and defining his duties and powers, and practically thereby making him the chief executive agent of the bank.

In the absence of such a by-law the board of directors may, by proper resolution, enlarge his powers beyond those enumerated either in the charter or the by-laws; but the board cannot delegate to the president a power vested by law in them which the law imposes upon them to execute and perform.

His executive powers inherently are limited, but in the holding of the office, he is regarded as having charge of the affairs of the bank; and the public generally concedes to him authority which, in fact, he does not possess. Independent of his inherent or *ex officio* powers, his acts must be authorized, acquiesced in, or subsequently ratified by the board of directors in order to bind the bank.

Usage and custom may confer upon him certain power and

authority, and he may bind the bank; but where his acts are clearly beyond those authorized by usage and custom, and are such as to lead a customer of the bank to question them, the bank will not be held responsible.

His powers, therefore, in the management of the bank should be delegated to him.

He is an agent of the board of directors, and must perform the duties within the scope and authority of his agency.

As previously stated, his inherent power is limited.

In the absence of any order of the board of directors, the president of a banking corporation has the inherent power to employ counsel, and manage the litigation of a bank.[1]

He has the power by virtue of his position to take charge of all the litigation in which the bank may be involved. He may engage and retain counsel, and enter into an agreement as to compensation. He may, without previously submitting the question to the board of directors, bring suits in the name of the bank; and also appear, answer and defend the bank when sued. An exception to this right may arise, where the bank through an action of the board of directors, have engaged an attorney to attend to all the litigation in which the bank may become involved.

In the case of the Pacific Bank v. Stone, 121 Cal. 202, the court says: "The president or acting president of an insolvent bank, has no authority by virtue of his office merely to retain special counsel in addition to the attorneys of the bank regularly employed to assist in litigation for the bank; without the sanction or ratification of the board of directors. * * * We can perceive no reason why a bank president should be clothed with *ex officio* powers greater than those of presidents of any other corporation. As director he derives his authority from the same source as presidents of other corporations organized under the statutes, and as the presiding officer, his functions and powers in the management of the corporate business are no greater than any other director."[2]

Reasoning from the case reported in 121 Cal. 202, the inherent power vested in the office of president of the board of directors and *ex officio* president of the bank, is co-ordinate

1 Citizens' National Bank *v.* Berby, 37 Pac. Rep. 131.

2 Wickersham *v.* Crittenden, 93 Cal. 17.

only with that of any other director, and the single power, namely, that of employing counsel and representing the bank in all of its litigation, may be taken away from him by a resolution of the board of directors, but in the absence of this act on the part of the board, or a provision in the by-laws of the bank, divesting him of his power as president of the bank, he has the authority to employ counsel and conduct the litigation of the bank; and it is immaterial whether the power of reference is lodged in the president and directors, or in the stockholders assembled in general meeting; for the entire corporation is represented in court by its counsel, whose acts in conducting the suit are presumed to be authorized by the party.[3]

The president of a national bank has power, by virtue of his office, to compromise or release a debt due the bank. Associate Justice Stevens, of the Court of Civil Appeals, in discussing the inherent power of the president of a bank to compromise a debt due the bank, says that in the absence of usage or authority otherwise derived from the board of directors, the powers of a bank president go little beyond those of any other individual director, and the doctrine laid down in Farmers' National Bank v. Templeton, 40 S. W. 412, is in substance that the president of a bank has power by virtue of his office, to release or compromise a debt due the bank when usage, and previous course of business has sanctioned such a power.

It is also held in the case of Guernsey v. Black Diamond Coal Co., 99 Iowa 471, that the president of a bank has authority by virtue of his office, to assign a judgment which has been obtained and owned by the bank.

Where a clerk employed in a bank has absconded and taken funds of the bank, the president is authorized to offer a reward for information which may lead to the arrest or conviction.[4]

As is shown, his powers inherent in his office are limited; but, as stated, he may exercise power and bind the bank by usage, where the board of directors has full knowledge of such

[3] The Alexandria Canal Company v. Swann, 5 Howard 83; Citizens' National Bank of Kingman v. Berry, 53 Kan. 696, 37 Pac. 131; American Insurance Company v. Oakley, 9 Paige (N. Y.) 496.

[4] Bank v. Griffin, 168 Ill. 341, 48 N. E. 154.

acts, and from time to time acquiesce and make no objection, his acts will be considered as authorized.

It has been held that where the president has borrowed money and executed a note in the name of the bank, without authority from the board of directors, or resolution to that effect, and they have the knowledge of transactions of this nature, and acquiesce in the same, the bank will be bound.[5]

The president is clothed with implied power to indorse negotiable paper in the ordinary transactions arising in the bank's business.[6]

In the case of Winton v. Little, 94 Pa. St. 64, it is held that where the president without authority released a lien of a judgment belonging to the bank, that the bank had a knowledge of the fact and acquiescing therein for a long period of time, was bound by his acts.

The president, it would seem, has the authority to enter into an agreement with a person to receive money on, or in payment of a note at a place other than the place of payment, and to forward the money to the bank where the note is held and where payable.[7]

This rule seems to be in conflict with the rule holding a cashier responsible for the money received or collected for the bank while absent and away from the bank.

The president's acts may be those which appear to have been executed in an individual capacity, but in fact are the acts of the bank.

In the case of Van Leuven v. First National Bank of Kingston, 54 N. Y. 671, it is held that where the president received government securities to exchange, and he gave a receipt as an individual, executing the same upon bank paper, his act was held to be the bank's act.

The contracts of the president entered into with individuals, who at the time believed that he was acting in his official capacity, and authority as manager and president of the bank, his acts will bind the bank, especially so if the bank receives the benefit of the transaction.[8]

[5] National Bank of Commerce *v.* Atkinson, 55 Fed. Rep. 465.

[6] U. S. National Bank *v.* First National Bank of Little Rock, 79 Fed. Rep. 296.

[7] Vilas Nat'l Bank *v.* Strait, 58 Vt. 448.

[8] Tremont Bank *v.* Paine, 28 Vt. 24.

The failure upon the part of the president to designate himself in the contract as president of the bank, if at the time he was in fact acting as such, such facts, if shown, the bank will be bound by his act. The question is one of fact and is one for the jury to determine.[9]

As we have shown, the inherent power in the president is confined to only a very few acts, but as stated, his powers may be enlarged by direct authority from the board of directors, and they may make him the exclusive manager of the bank's affairs, and authorize him to perform any and all acts other than those which the law compels them personally to perform.

He may, as general manager of a bank, perform all the ordinary transactions, but being delegated with the power as general manager, does not give him authority to execute notes and borrow money for the bank.

The above rule is supported by many leading authorities.

In the State of Arkansas we find the rule laid down in the case of City Electric Street Railway Company v. First National Exchange Bank, 62 Ark. 33, as follows: "It may be stated as a general proposition that the president and secretary of a corporation are not empowered to bind it by their signature to commercial paper, unless the authority is expressly conferred by the charter, or given by the board of directors. They have no inherent power to execute negotiable notes in the name of the corporation. Tied. on Com. Paper, § 121; Cook on Stock, etc., § 716; McCullough v. Moss, 5 Den. 567; 4 Thompson on Corp., § 4619; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. 31; Hyde v. Larkin, 35 Mo. App. 365; Pierce on Railroads, §§ 32–34; Walworth County Bank v. Farmers' Loan, etc., Co., 14 Wis. 325; 1 Morawetz on Corp. § 537; Titus v. Railroad Co., 37 N. J. L. 98–102; Wait v. Nashua Armory Ass'n, 23 Atl. Rep. 77, and authorities there cited; National Bank v. Atkinson, 55 Fed. Rep. 465."

In New York the rule adopted by the Supreme Court of Judicature, in 1831, in the case of Life & Fire Insurance Company v. The Mechanics' Fire Company of New York, 7 Wend. 31, is laid down by the court as follows, "Such authority is not implied from his appointment as president; as such he is merely the presiding officer of the board of directors, chosen

9 Northern National Bank *v.* Lewis, 78 Wis. 475, 47 N. W. 834.

by them from their own body, and has no more authority from the charter to bind the company by any of his acts than any other director has; his powers are such only as the board of directors, either by their by-laws or otherwise, think proper to confer upon him."

This rule of law is the rule now in force in the State of New York. It is the general rule and is upheld by the courts of all the States.

The rule, as laid down in one of the later cases, and stated by District Judge Riner, in the case of National Bank of Commerce v. Atkinson, 55 Fed. Rep. 465, is substantially the same rule as laid down by the court in New York in 1831.

The court, in the latter case, states the rule to be that "the president of a national bank has no power inherent in his office to bind the bank by the execution of a note in its name, but power to do so may be conferred on him by the board of directors, either expressly, by resolution to that effect, or by subsequent ratification, or by acquiescence in transactions of a similar nature of which the directors have notice."

There is a strong tendency upon the part of the court and authors of text works treating upon this subject at the present time to establish a more liberal rule. One which may be stated as follows: "The extent of the powers of agents of a well defined class, such as presidents, directors or cashiers, is determined largely by general custom, of which the courts will take judicial notice, and parties dealing with such agents are entitled to assume that they possess all the powers which are usually accorded to agents of the class to which they belong." [10]

Mr. Morawetz holds that the authority of officers of banks is fixed by general custom, of which the courts will take judicial notice, and that they are not held to the strict rule which applies to officers of other corporations.

Banks are not incorporated for the purpose of borrowing money. It is their business to receive money on deposit and reloan the same together with such portion of the capital, and reserve fund, as the law will permit. There should but few occasions arise presenting the necessity of a banking cor-

[10] Morawetz, Priv. Corp., vol. 1 (2 ed.), § 509; Hyde *v.* Larkin, 35 Mo. App. 365, and cases cited in respondent's brief.

poration to borrow money. The general rule which has been conceded to be the law for so many years should not be weakened upon the theory that a more liberal one, would be of special benefit to the public or banking corporation. At least the borrowing of money by the president of a bank without direct authority, should not be sanctioned by the law as justifiable, and lawful upon the theory that it is or has been a practice or custom of the bank.

The president has the implied power to indorse negotiable paper in the ordinary transaction of the bank's business; and authority for this purpose need not be conferred upon him by the board of directors.[11]

It is laid down in the case of Simons v. Fisher, 55 Fed. Rep. 905, that where the president exercises the function of cashier, and is the managing officer of the bank, the bank will be bound by such acts of his as belong *virtute offici* to the office of cashier.

§ 120. President's powers derived from statute.

Where a statute of a State confers a power upon an officer of a corporation, there can be no necessity of a by-law or resolution of the board of directors authorizing him to execute the power.

In some of the States special statutes have been enacted providing that many matters may be conducted in the president's name.

In the case, Delafield v. Kinney, 24 Wend. (N. Y.) 345, a suit against a banking association formed under the general banking laws of the State, it is held, may be brought against it either in the name of the association or in that name with the addition of the name of the president thereof.

§ 121. Limited and prohibited power of president.

The president of a bank, like the cashier, cannot certify his own check. Such certification appears on its face and is notice of fraud to all.[12]

The president has no inherent power to transfer or indorse negotiable paper, but through a custom or habit of performing

11 United States Nat. Bank *v.* First Nat. Bank of Little Rock, 79 Fed. Rep. 296.

12 Chrystie *v.* Foster, 61 Fed. Rep. 551.

such acts which are well known to the board of directors, they become lawful acts and cannot be denied by the bank.[13]

As president of the bank he has no authority by virtue of his office to receive the claims of a bank as against a debtor. That power rests alone with the board of directors; and in order to bind the bank, the consent of the board, either directly or by implication, must be first obtained.[14]

Neither has he authority by virtue of his office to use any portion of the assets of the bank to settle with the bank's creditors. He may, however, do so, if the power is conferred upon him by the board of directors. Neither has he the authority to mortgage the property of the bank, but when authorized to do so, may execute a mortgage upon the bank's property.

Neither has he inherent power to stay the collection of an execution against the property of a judgment debtor. The board of directors alone are endowed with this power.[15]

Nor has he authority inherent in his office to enter into agreements or contracts on behalf of the corporation, but it is held that this power may be conferred upon him by the board of directors.

As an officer of the bank he has no implied authority to give away any portion of the corporate property, or to create a gratuitous corporate obligation binding on the corporation.[16]

If as president of the bank he holds out to the public that certain powers have been delegated to him, and it is believed by parties dealing with him that he is acting within the scope of his power, his acts are binding upon the bank.[17]

A commercial banking corporation doing a banking business and refusing to pay interest on deposits, advertising that it does not pay interest, its president has no power or authority to enter into an agreement with a customer to pay interest, and if such a contract is entered into in violation of the rule, and advertisement of the bank, it cannot be held responsible for the interest. An agreement to pay interest on deposits of money deposited in a commercial bank is no part of the ordinary busi-

13 United States Nat. Bank v. First Nat. Bank, 79 Fed. Rep. 296.

14 Olney v. Chadsey, 7 R. I. 224.

15 Spyker v. Spence, 8 Ala. 333.

16 Robertson v. Buffalo County Nat. Bank, 58 N. W. 715.

17 Farmers' Bank v. McKee, 2 Pa. St. 318.

ness of the bank, and the president has no power to bind the bank to pay interest in such cases.[18]

Where a bank is entitled to and makes it a part of its business to take special deposits, the president cannot charge the bank with any extraordinary liability in regard to such deposits. He has no power or authority by virtue of his office to compromise a debt. This duty belongs to the board of directors.[19]

The president of a bank is without authority to release a judgment which has been entered in a court of record, in favor of the bank, unless duly authorized by the board of directors.

The satisfaction or release should set out that it was ordered by the board of directors, and it should have the seal of the bank attached. Where the president performs acts which are not implied or inherent in his office, but which are afterwards ratified by the board of directors, they become the legal acts of the bank, and where a bank retains the proceeds derived from the sale of property, and guaranty of notes owned by the bank, the fact that the bank retains the proceeds, operates as a ratification of the president's acts in the selling of the property, whether he was authorized or not.[20]

An agreement by the president and cashier of a bank, that an endorser shall not be liable on his indorsement is not binding on the bank. It is not within the scope of their duties, and they cannot bind the principal except in the discharge of their ordinary duties.[21]

§ 122. Representations and admissions, effect of.

The general rule is that the president of a bank, by admissions and representations, may bind the same, if such admissions or representations relate to matters within the scope of his agency, and, like other agents, he must act within the scope of his authority to bind the principal.[22]

18 Fulton Bank v. New York & Sharon Canal Co., 4 Paige (N. Y.) 127.

19 Ryan v. Manufacturers' & Merchants' Bank, 9 Daly, 308.

20 Thomas v. City National Bank, 59 N. W. 943.

21 First National Bank of Sturgess v. Bennett, 33 Mich. 520; Angel & Ames on Corporations, §§ 298, 301, 309; Story on Agency, § 115; Parsons Merc. Law, 140 note 1; Bank v. Dunn, 6 Pet. 51; Bank v. Jones, 8 Pet. 16; Minor v. Bank, 1 Pet. 46; Hodge v. Bank, 22 Gratt. 51; Harrisburg Bank v. Tylor, 3 W. & S. 373; Merchants' Bank v. Marine Bank, 3 Gill, 96; Crump v. U. S. Mining Company, 7 Gratt. 352.

22 Panhandle National Bank v. Emery, 78 Tex. 498, 15 S. W. 23.

The president of a national bank has no inherent authority to make such admissions as will release the maker of a note from his liability.[23]

Neither can the president of a bank by admissions charge the same with a debt.[24]

In the case of Washington National Bañk v. Pierce, 6 Wash. 491 (33 Pac. 972), it is held that where the president of a bank is informed by the maker of a promissory note that the same was procured by fraud, and that he (the maker) would not pay it, the remark not being made to the president in his official capacity, nor at the bank, does not bind the bank. Such knowledge does not estop the bank from subsequently discounting the note.

§ 123. President liable to bank for acts which amount to breach of trust.

Where the law forbids overdrafts, and the president or cashier permit the overdrawing of the account of a customer, and through such overdraft a loss occurs to the bank, the president authorizing the same becomes personally liable.[25]

In a review of the opinion in the case of the Oakland Bank of Savings v. Wilcox, it was found that the president was subject to the by-laws and direction of the board of directors. There is no provision found in these by-laws permitting a customer to overdraw his account.

It was the duty of the auditing committee to supervise and direct the mode in which the business was to be conducted. It was their duty to count the cash and examine, or cause to be examined, the books, vouchers, documents, papers and other assets of the corporation.

The duties as they here appear, devolved upon various persons; but this was held not to discharge the president in the failure to perform his duty.

The lower court in the trial of the cause, in giving his instructions, granted the following instruction to the jury:

"It has been said to you, gentlemen, during the argument

23 Farmers' National Bank *v.* Templeton, 40 S. W. 412.

24 Henry *v.* Northern Bank of Alabama, 63 Ala. 527.

25 Oakland Bank of Savings *v.* Wilcox, 60 Cal. 126.

of the case, that it was a usage at the bank to allow customers to overdraw, and have checks and notes charged up without present funds in the bank. I believe there is evidence before you showing the existence of such a usage to a certain extent. The fact, however it may be, is for you to find. But I say to you, as a matter of law, that if such a usage did exist, it would not justify an officer of the bank in case of loss. The usage is still nothing more than usage and practice to misapply the funds of the bank, and to connive at the withdrawing of the same without any security. Such a usage and practice is a manifest departure from the duty both of the directors and president of the bank as cannot receive any countenance in a court of justice. It cannot be done by the sanction or approval of any officer of the bank, and when done it is at his own peril and responsibility, especially if done in his own interest."

The foregoing instruction may be criticized by the courts as too broad, but it is wholesome advice to officers having charge of funds deposited in the bank.

The instruction as given the court justly says may be too broad, but declares it to be applicable and justifiable in this case.

Where the president takes a note which is burdened with a guaranty, and which is liable to cause loss to the bank, it is held in the case of Stearns v. Laurence, 83 Fed. Rep. 738, to be such negligence in case of loss, as will render him liable to the bank, and where the president sells property of the bank without first obtaining the authority from the board of directors to do so, and loss occurs, he is liable to the bank.[26]

Where the president of a bank, by false statements in relation to its affairs, when such statements are officially made, and loss occurs to one who has relied upon such statements, the president is personally liable.[27]

The National Banking Act, by provision of section 5209, makes a false statement of the affairs of a national bank a misdemeanor.

A false entry or statement is one which is intended to deceive and represent that which is false as true. The Supreme Court

26 First Nat. Bank of Central City *v.* Lucas, 21 Neb. 281.

27 Prewitt, Trustee, *v.* Trimble, 92 Ky. 176.

of the United States says, "that where a president of a bank placed on its books to his own credit at their face value bonds known to him to be worthless or of small value, without the authority of the board of directors or stockholders, the fact that he gave a guaranty of payment of the bonds on demand, does not relieve him from liability; or of an intent to defraud the bank by misapplying its money, although at the time he was solvent and intended to pay his guarantee on demand."

§ 124. President borrowing from bank.

The president of a bank, unless expressly prohibited by statute, may borrow money from the bank, as any other person may, and execute a valid note for the same that will bind him as well as the bank receiving it. Such a note is not void, nor in the absence of fraud it cannot be repudiated or avoided by the bank.[28]

The president of a bank should not be permitted to borrow its funds, without the consent of the finance committee; and in the absence of such a committee, the loan should be passed upon by the board of directors.

The statutes of some of the States limit the amount which may be borrowed from State banks by any one person. The by-laws may control this privilege where the statute is silent upon the subject.

The national banking act places a restriction or limitation against making loans to any association, person, company, corporation or firm in excess of one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed.

This provision of the statute does not prohibit an officer or director from borrowing money, but limits the amount which may be borrowed at any one time. This is a wise provision of law and should be strictly enforced.

The various States which have not now a statute similar to that enacted by the United States, should be urged to place such a law upon the statute books of the State.

28 Blair *v.* Bank of Mansfield, 10 Lg. N. S. 94.

Officers and directors of savings banks are by statutes passed in most of the States, prohibited from borrowing any of the funds from the banks over which they act and preside.

The penalty prescribed by the National Bank Law for a violation of its provisions, prohibiting any one person from borrowing to exceed 10 per cent. of its capital actually paid in, only subjects the bank to a forfeiture of its charter.

The loan may be collected, although made in excess of the amount prescribed. The bank can recover the full amount.[29]

Section 578, Civil Code, California, provides that: "No director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, nor must he become an indorser or surety for loan to others, nor in any manner be an obligor for moneys borrowed of or loaned by such corporation. The office of any director or officer who acts in contravention of the provisions of this section immediately thereupon becomes vacant."

This section operates as a prohibition to the bank in making or accepting a loan made to it by an officer or director; and is a violation of its charter. The making of such a loan may be sufficient grounds for an action against it to declare the same forfeited; but such an action when brought must be instituted by the Attorney-General of the State, in a suit brought by him in the name of the people.

Where a statute by its provisions declares that if a person holding an office in a private corporation violates the expressed provisions of the same, and that the office thereupon immediately becomes vacant, the vacancy may be filled as the law or the charter may provide. But where there is no provision in the charter or by-law authorizing such vacancies to be filled, the office remains vacant until the next general election, when it may be filled as provided for by the statute governing such provisions.

The office of a bank director or president is a private office, and the general laws of the State affecting vacancies in public offices does not apply. The power to declare the office vacant in a banking corporation is vested in the board of directors.

[29] Gold Mining Company *v.* National Bank, 96 U. S. 640; Corcoran *v.* Batchelder, 147 Mass. 541.

A statute which declares that the office of a director in a private corporation shall become vacant upon the happening of a certain event, to wit: the violation of a law, which fails to provide the mode of filling the same, such vacancy can only be filled under the provisions of the law governing such corporations.

The fact that an officer of a banking corporation borrows money of the bank in violation of the statute, which declares that he must not do so, does not prevent the bank from enforcing the collection of the debt.[30]

§ 125. President's compensation.

The president of a bank is entitled to compensation for services rendered to the corporation; but there is no implied promise to pay him because he has been elected by the board of directors as its president; and he is not entitled because of his position to compensation, any more than any other director who may perform services for the corporation.

The president, however, when he has been delegated and selected as the general manager of the bank; and devotes his energy and time to the bank's affairs, his salary is usually fixed by the board of directors; but if no action is taken by the board in fixing the amount to be paid him, he can recover for his services only such a sum as may be deemed reasonable for the labor performed.

It is held that the president of a bank who superintended the repairs upon a building situated upon real estate owned by the bank, could not recover for such services. This would be the case where he had previously been engaged upon a fixed salary; but if no salary was fixed and the services were performed with the knowledge and consent of the board of directors, he could recover the value of his services.

The board of directors having the authority to employ the president, it may discharge him.

The National Banking Act provides that it is within the power of the board of directors to "appoint a president" * * * and "dismiss such officers or any of them at pleasure and appoint others to fill their places."

The directors may remove the president at any time for

30 Savings Bank v. Burns, 104 Cal. 473.

cause; and the bank cannot be held liable to him for the unexpired term. Under the National Banking Act they may remove him at their pleasure and the bank cannot be held liable for the unexpired term.[31]

In the State of Illinois it is held that where the bank has employed a president at a fixed salary that the directors have no authority or power to pay him any sum as a bonus in addition to the salary fixed. He cannot recover for services or acts performed for the bank, though performed or coming outside of his duties.

If the bank's charter provides that the president shall not be permitted to draw a salary, the board of directors have no authority to engage to pay a regular salary; but they may engage to pay him for services rendered; and if no stipulation or agreement is entered into as to the value of such services, he may recover for labor performed the value of his service.

Where the president is actively engaged in the interests of a State bank, and the board of directors have engaged his services for a fixed period of time, he can be discharged only for cause, and may recover for the unexpired term if discharged without cause.

The only exception to this rule are the provisions of the National Banking Act which as stated provide that it is within the power of the board of directors to dismiss him at their pleasure and appoint another to fill his place.

31 Taylor v. Hutton, 43 Barb. 195.

CHAPTER X.

THE CASHIER.

§ 126. Cashier, general duties and qualification.

The cashier of a bank is elected by the board of directors, the term of office being usually fixed at the time. He should be required to give a bond for the faithful performance of his duties. The cashier, unless there be a vice-president, ranks next in authority to the president, and has certain specified duties to perform. He is selected for his business qualifications, and adaptability to the business which he is required to transact. His specific duties are to attend to the correspondence. He receives all letters and communications addressed to the bank, and should make it his business to open and attend to the contents of the same. All applications for loans, discounts, proposals for new customers, orders for the sale or purchase of stock, bonds, letters asking for advice concerning the standing of persons etc., should be retained by him and when answered copies should always be kept. Letters received containing statements of enclosures, and collections are usually passed over to clerks having charge of those departments and by them in due time answered.

His position in a large bank is one of great responsibility. He must on entering the bank each morning see that all the clerks are on hand. If a vacant place is observed, it is his duty to supply the work necessary to be performed during the day. Some one may be found to take the place or perform the labor; if not, and it becomes necessary, the cashier should be sufficiently qualified to supply the place, and perform the labor himself.

His business is executive and supervisory. He is supposed to be the thermometer of the bank, and should be able to denote the condition and financial temperature of the same at any time.

It should be his imperative duty to examine daily the balance books, and as frequently as possible inspect the work of clerks, and keep himself informed concerning the business of the bank.

His position necessarily brings him continually in contact with the patrons of the bank, and through these means he can in every proper way increase the business of the bank. The profits in the business in most banks are made on the deposits. To increase these, therefore, the cashier has the greatest opportunity. New accounts, if desirable, are eagerly sought. While this is true, no well conducted bank will blindly open an account with a person without due investigation. A depositor, if not known, should be properly identified and introduced, and before an account is opened or accepted, his character ascertained; and this investigation usually is the business of the cashier.

The duties of a cashier may depend in a degree upon the conditions surounding the bank. The location, and volume of business which the bank has may enlarge or lessen the detail of labor and his responsibility; but it is his duty, however, under all circumstances, to see that all papers, valuables and other property of the bank, are in its possession. He should see that, at the close of business, the cash is properly and safely placed in the vaults and the doors securely fastened. It is claimed that, though other officers may have access to the money and other property of the bank which is confided to the cashier, his responsibility therefor is not released.

In an important case upon this subject, Chief Justice Mitchell said: "We cannot know judicially what officers and employees are required for the conduct of the business of the bank, nor can we define in detail their several functions and duties. These vary — vary according to the location and business of the bank. It is, however, a matter of such common observation that courts cannot be ignorant of the fact that in the administration of the daily affairs of a bank some one besides a cashier must have access to its funds. It by no means follows that the cashier is not so far in possession as to be rightfully held responsible to account for the funds of the bank to the extent, perhaps, of exhibiting each day, or whenever properly called upon, at least the exact condition of its affairs." [1]

This seems to be generally conceded, but it certainly cannot be held that for the carelessness and negligence of other

1 Bank of the State v. Wheeler, 21 Ind. 90.

employees, having access to the funds and other property of the bank that the cashier should be liable when loss in such cases occur, unless by the negligence and carlessness of the cashier, he having knowledge of the fact that the funds or valuables were being handled by the employees when it was his duty alone to handle and safely care for the same.

The duties and responsibilities of the cashier are many. His position is one of great importance, and he should be a man of irreproachable character, a good judge of human nature, alert and circumspect. He should have a good education, and be satisfied to make a quiet and genteel living by means of study, work, and close aplication to business, willing to forego chances for the accumulation of large fortunes, or of fame. He should be content with steady employment which, if his adaptability and habits justify, will insure him. He should, in conclusion, carefully avoid everything which might in the public eye compromise himself, and through him the bank which employs him, and unless in the beginning he can master himself for these duties, and responsibilities he should avoid banking.

§ 127. Cashier executive officer of the bank.

The Supreme Court of the United States, in the case of The Merchants' Bank v. State Bank, 10 Wall. 604, in defining and discussing the powers and duties of the cashier of a bank, says: "The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed but they are under his direction and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this, in itself, would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown." [2]

[2] Commercial Bank of Lake Erie *v.* Norton *et al.*, 1 Hill (N. Y.) 501; Bank of Vergennes *v.* Warren, 7 Hill 91; Beers *v.* The Phoenix Glass Company, 14 Barbour, 358; Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 14 New York 624; North River Bank *v.* Aymar, 3 Hill 262, 268; Barnes *v.* Ontario Bank, 19 New York 152.

The office of the cashier is strictly executive. In the absence of expressed authority from the board of directors, he can only perform the daily routine business of the bank. To state his position correctly he is the executive agent of the board of directors. The leading authorities hold that beyond the ordinary business of the bank his acts must be authorized, and directed by the board of directors.

In the case of the United States v. City Bank of Columbus, 21 Howard, 356, the Supreme Court of the United States held: that where the cashier of a bank wrote to the Secretary of the Treasury saying, "that the bearer of the letter was authorized to contract for the transfer of money from New York to New Orleans, such a transaction was not within the scope of the powers of the cashier nor authorized by the directors, therefore the Bank was not bound to reimburse the money which the Secretary of the Treasury advanced."

In this case it was shown that the directors nor president of the bank had any knowledge of the transaction. All of the directors of the bank at the time of the transaction testified, that the cashier had not been authorized by the board or by any of themselves to constitute Miner, who was the bearer of the letter, as such agent of the bank. The directors also testified that they had no knowledge of the cashier's letter, and that they never sanctioned the same.

The court, in giving an instruction to the jury in this case, gave the following instruction: "That if they should find that the letter written by Moody (the cashier) was his own act, and had been given without the knowledge or authority of the board of directors, or any of them individually, except Miner, and that the agency of Miner was not constituted by or known to the board of directors, or any of them except Miner, but was the act of the cashier alone; and if they should find that Moody had no power as cashier, except such as belonged to the office of cashier generally, or such as was given by the charter or by the by-law or other law or usage of the said bank, that the defendant was not concluded by that letter, and is not bound by the contract made by Miner, without some subsequent ratification of the same, though the Secretary had, in contracting with Miner, relied upon it as the act of the bank."

The court, in discussing this instruction to the jury, says: "It is also in coincidence with the theories generally entertained of the powers and duties of the cashiers of banks, by those most familiar with the management and business of banks and perfectly so with such as has been expressed by this court in previous reported cases."

In the absence of expressed powers granted by the charter of the bank, or authority given by the by-laws of the corporation, or resolution duly passed by the board of directors, the cashier has no power to perform any act other than those which are termed inherent powers which belong to his office.

§ 128. Cashier's inherent powers.

The cashier or office of cashier, by long usage and custom with banks, has acquired certain inherent powers which the courts have judicially declared to be powers inherent in the office, and which have become settled as recognized law. They are such powers as the cashier may exercise without any special direction, vote, or authority from the board of directors. They are such as go with the office, inherent in the office.

As previously stated, his powers may be enlarged by the language of the charter or by by-laws duly adopted by the corporation, or by resolution of the board of directors. In the absence of such special authority, the powers denominated inherent powers are those which belong to him by virtue of his appointment to the office.

§ 129. Cashier has inherent power to certify checks.

The power to certify checks has by universal usage become recognized as an inherent power, belonging to the office of cashier. To perform this act the cashier is not required to obtain special directions or authority from the board of directors.

He may certify checks when requested so to do by a customer of the bank, if the bank has sufficient funds of the drawer against which the check is to be charged; and it may be said that it is a part of his duty to do so; but he has no authority to certify a check drawn upon the bank, unless the drawer has the full amount of funds deposited in the bank to pay the same at the time the check is drawn.

The National Banking Act, § 5208, Rev. Stat., U. S., pro-

vides that: "It shall be unlawful for any officer, clerk or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk or agent of any association, in violation of this section, shall subject the bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."

The Supreme Court of the United States, in the case of Thompson v. St. Nicholas National Bank, 146 U. S. 240, in discussing this section, while holding that it is a violation of the law for an officer of a national bank to certify a check unless the drawer of the same has an equivalent amount of money on deposit at the time, holds, that it does not preclude the bank from enforcing its claim out of collaterals pledged to secure the obligations of the drawer of the check.

The only penalty incurred by the bank through the acts of its officer for a violation of the provisions of this section, may be a forfeiture of the bank's charter; but where the law prohibits certain acts by banks or their officers, their validity can be questioned only by the United States, and not by private persons.

The penalty for false certification of checks by any officer, clerk, or agent of any national banking association, is provided for and fixed by section 13 of the act of July 12, 1882; which provides: "That any officer, clerk or agent of any national banking association who shall *willfully* violate the provisions of section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer, upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any Circuit or District Court of the United States, be fined not more than five thousand

dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court."

To constitute a criminal certification of a check by the cashier, it must be a willful act. The Supreme Court of the United States in the case of United States v. Britton, 107 U. S. 655, says: "That the willful misapplication of the moneys and funds of the banking association * * * means something different from the acts of official maladministration referred to in section 5239 (Rev. Stat., U. S.), and it must be a willful misapplication for the use of the party charged or of some person or company, other than the association, with the intent to injure and defraud the association or some other body corporate or some natural person."

To certify a check, the cashier writes the words "certified good," or the word "good," across the face of the check, usually dating the time of the transaction and signs his name officially to the certification. A stamp may be used, and in such a case the date and signature only are to be written. After the check is certified and delivered to the owner, the drawer's account is immediately charged, and the bank charges itself with the amount of the check by placing it to the fund called the "Certified Check Account."

The holder of the certified check may at any time present his check to the bank for payment, and the bank being a debtor to the holder of said check for the amount named therein, must pay the same on demand. While the bank's position is one of debtor, it may elect to notify the holder of the check, if known, to present the same for payment at any time.

The holder of the check is not a depositor of the bank, but is in the position or the relationship of a creditor, holding the obligation or certified check designating a certain sum of money due, and payable on presentation of the same.

The holder of the certified check cannot issue a check on the bank and draw against his credit, as he has no account with the bank, but simply holds a negotiable instrument with the bank's certified statement that on presentation by the legal holder of the same, it will pay it upon demand.

A certified check is in the nature of a certificate of deposit, which represents the fact that the bank holds for the legal owner of the same, the amount represented by the check; and

like a certificate of deposit, it must be presented when payment is demanded; and, like a certificate of deposit, the bank can refuse to pay any portion of it. But must pay in full on demand. The bank should not make a partial payment of the check and enter a credit upon the same; but if presented and a portion of the check is paid, the bank should cancel the original check and give credit to the owner for the difference, or issue in lieu of said credit a certificate of deposit, for the amount remaining due and unpaid.

It has been held that a check may be certified verbally; that is to say, where a check is presented by the drawer thereof or by the payee to the bank, and an officer of the same, duly authorized to certify checks, is handed the check and asked the question: "Is this check good?" and he replies in answer thereto, after examination of the same, that "it is good" or, "it is all right," then such language is equivalent to the certification of the check. It is held, however, in the case of Espy v. Bank of Cincinnati, 18 Wall. 604, that where a party to whom such a check is offered sends it to the bank on which it is drawn, for information, the law presumes that the bank has knowledge of the drawer's signature, and of the state of his account, and it is responsible for what may be replied on these points.

That unless there is something in the terms in which information is asked, that points the attention of the bank officer beyond these two matters, his response that the check is good will be limited to them, and will not extend to the genuineness, of the filling in of the check as to the payee or amount.

The court further holds that a verbal reply that a check is "good" given for the information of the party about to receive it, extends only to matters of which the bank had knowledge, or is presumed to have by the law, unless he is told that more extended information is expected or asked for as to the validity of the check.

In so far as the cashier's power is concerned, it is conceded that by universal custom and usage among banks, he has the inherent power to certify checks. This privilege or power, however, is not exclusive to the office. The president of the bank and vice-president also, are inherently clothed with the power; and may do so without having special authority granted

to them by the board of directors. It is also claimed that the assistant cashier and the paying teller, by usage and custom, have the inherent power and may certify checks; but the soundness of this law has been questioned. It is held that the assistant cashier, or teller, cannot without authority first obtained from the board of directors, perform this function, but if authorized to do so, they may make such certificates.

The courts of the various states have discussed this question of inherent power in officers of banks, to perform certain functions, and have attempted to give logical reasons why a certain officer is clothed with incidental or inherent powers, and some of them have declared the law to be that the cashier is alone delegated inherently to certify checks. One court undertakes to show that the power is only inherent in the teller. Many of these decisions are written without any knowledge of the business of banking, or the division of duties which necessarily and naturally belong to the various departments and officers.

To hold that the cashier alone is clothed with the power to certify checks, is establishing a law, which by usage and custom, is accepted everywhere. While it may be conceded that such a custom and usage is inherently established, as a part of the duty of the cashier, it does not necessarily follow that no other officer of the bank is without this inherent power.

One court holds that the teller cannot certify a check because he is not authorized to "pledge the bank's credit." This statement and language is sufficient to demonstrate the fact, that the learned jurist is not a banker. The bank's credit is not in any way affected by the certification of the check. The money to meet the check's payment before certification must be placed in the bank, and all the bank does, or binds itself to do, through its officer, is to pay the check when it is presented. It enters into no extraordinary transaction. In the simplicity of the act it is accepting a certain sum of money from a customer, and certifying that the amount for which the check is drawn is in the bank, and that it will be paid to the *bona fide* holder of the same when it is presented.

Again, it is the depositing of a certain sum of money with the bank, (which a teller ordinarily has the right to receive), and when so received the bank by agreement, namely, the certification of a check drawn against the amount by the depositor,

agrees that it will, on presentation of the check, pay the same. There is no "pledging of the bank's credit" in such a transaction, and, it may be argued, that if the teller has the inherent right to receive the money of customers for deposit, inherently he should have the power to certify the depositor's check, which is in effect the payment of the check in advance, the drawer's account having been charged with the amount at the time.

We find the New York courts sustaining the position that the authority to certify checks is inherent in the cashier, and that such authority is derived by usage. If a bank establishes a custom with its dealers and those doing business with it, which is reasonable, and the act performed under such a custom does not work an injustice to the parties dealing with it, and where such custom is universal with the banks in that particular locality, the courts will sanction the custom and make it the law. Therefore, if it is the custom of the teller to certify checks of the bank, it is reasonable to assume that the power is inherent in his office. The nature of the business, particularly delegated and performed by him, of receiving money and paying checks, comes within that class of duty or authority, which the teller assums and transacts daily and hourly, and the certifying of checks is nothing more than the receiving of money and paying the same out again upon a written order or check.

In the case of Merchants' Bank v. State Bank, 10 Wall. 604, which is cited as a leading and important case upon the question of inherent power, in the cashier to certify checks; the court there holds that if the cashier has power to receive the moneys, the authority to receive implies the power to give certificates of deposit and other proper vouchers. Upon the same reasoning, and upon the same ground, the teller who receives deposits has implied authority to perform the act of certifying a check, as it simply amounts to the payment of a deposit.

The by-laws of the bank may deprive the cashier or the teller of this particular power, and place the same exclusively in some other officer of the bank, but in the absence of such a delegation of power or restriction of power in the by-laws, the cashier and paying teller, by the very nature of their duties, should have the inherent power to certify checks.

In the absence of a limitation, or prohibition, of a power which by the very nature of the business is required to be per-

formed by an officer of the bank, it becomes his duty to perform the same, and the act, when performed, may be said to be an inherent power in the office.

The law is settled that where the directors in a bank allow an officer to certify checks, the bank cannot repudiate his acts; and where no knowledge of restrictions or limitations are known to the general public, the act is valid between the bank and the party dealing with it.

The cashier or other officer of a bank who, without authority, certifies a check "good," when the drawer has not unincumbered funds deposited in the bank to meet the check, is a wrongful act, and a person having knowledge of such a fact is presumed to know that such an act was unauthorized, and therefore void; and such knowledge of the wrongful act will not permit the party to hold the bank liable; but if the check is negotiable, and passes into the hands of an innocent holder without notice, the bank cannot repudiate the check.

In the case of Morse v. Massachusetts National Bank, 1 Holmes, 209, the court says: "The certificate of a cashier of a bank that a check is "good" is a representation of a present existing fact within his knowledge as cashier, and if that certificate be made by him in the course of his ordinary business as cashier, it will bind the bank in favor of innocent third persons, upon the principle of *estoppel in pais*, even if the certificate is not true, and the drawer of the check has no funds on deposit in the bank."

§ 130. Cashier cannot certify his own check.

The certification of his own check is utterly void, though he has money to his credit in the bank covering the amount of the check. The fact that he has deposited, or has on deposit, the amount of the check does not authorize or give him the power to certify his own check.

Where an officer of a bank is authorized to certify checks, and certifies his own check, which passes into the hands of a *bona fide* holder for value, the bank, though not liable, should be held for it. It has been held that where the president of a bank had drawn his check, and certified the same, that this fact alone was not sufficient to charge the holder with notice, and there being no proof of notice that the drawer was the person

who certified the check, the bank was held liable; but it is also held that if the names are identical that fact alone is sufficient to put the holder at least upon inquiry, and the bank is not liable. The fact that the names are identical might occur, and a more reasonable holding would be, that proof should be furnished, showing that the *bona fide* holder for value, had notice that the drawer and the officer certifying the same, were one and the same person.

In the case of The Clark National Bank v. The Bank of Albion, impleaded, etc., 52 Barb. 592, it is held that a holder of a check certified to by the cashier cannot recover from the bank unless it appears that he became the owner and holder of the check in good faith for a full and fair consideration and without notice of the cashier's want of power to make the certification.

Where the public and those dealing with the bank, have notice that a cashier by the very nature of his office and business, is authorized to certify checks; the want or lack of power to certify his own check is requiring of those dealing with him extraordinary (or legal) knowledge of all his expressed and implied power.

It is requiring of the public and persons dealing with the cashier a degree of information as to his powers, which the law does not impose upon persons generally who deal with general agents. There are but few persons who deal with banks that have notice that the cashier cannot certify his own checks; and if they are not possessed with such notice, the holder of a *bona fide* check should be in a position to hold the bank.

The law, as laid down by the courts, however, and the rule adopted, is stated as follows: "*Where the face of the check shows the officer's attempt to use his official character for his private benefit, every one to whom it comes is put upon inquiry; and when the certificate is false, no one can recover against the bank as a bona fide holder.*"

§ 131. **Power to draw checks.**

The cashier has the inherent power to draw drafts or checks, when the business of the bank requires it upon the funds of the bank when deposited elsewhere. It is not necessary for the board of directors to confer such a power upon him; it is

inherent in the office. In the exention of such checks he should designate himself as cashier of the bank which he represents.

This is very important where a cashier by a check or draft directs that the funds of his bank be transferred or paid to a certain person, the check or instrument should be so drawn, showing on its face all the necessary elements of perfectness; and have all the marks of official authority upon it. A failure to perform his duty in this particular may cause loss to a customer of the bank; which negligence upon his part may also make him liable personally.

If the instrument is imperfect, for example, if the cashier fails to sign it as cashier, designating the bank which he represents, it may be refused payment. The bank or cashier upon whom it is drawn should refuse to honor it if presented and signed in an individual capacity. The payee bank may honor it, and be safe in doing so, but if it is shown that the cashier was not acting in his official capacity when the check was drawn, the bank paying it would have to sustain the loss. Parole evidence is admissible to show the fact, namely, that the cashier was acting in his official capacity; and that it was an omission upon his part to sign his name as cashier.

In the case of Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, the question presented to the court in this case arose upon an instrument or check issued by the cashier of the Mechanics' Bank of Alexandria, which check was signed by the cashier in his individual capacity. The form of the check is given in the reported case as follows:

Mechanics' Bank of Alexandria

No. 18. "Mechanics' Bank of Alexandria.

June 25th, 1817.

Cashier of the Bank of Columbia,

Pay to the order of P. H. Minor, Esq., Ten thousand Dollars.

"Wm. Paton, Jr."

$10,000

This is one of the early cases. It presented the following question: Was the act of the cashier official, his name appearing and being signed in an individual capacity.

The court declared in delivering the opinion that parole evidence was admissible when the instrument upon its face raises a doubt as to the capacity in which the officer was acting.

The justice, in delivering his opinion of the court, says:

"The question is whether a certain act done by the cashier of a bank was done in his official or individual capacity? Had the draft, signed by Paton, borne no marks of an official character on the face of it, the case would have presented more difficulties. But if marks of an official character, not only exist on the face, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensible. * * * The only ground on which it can be contended that this check was a private check is, that it had not below the name the letters Cas. or Ca. But the fallacy of the proposition will at once appear from the consideration that the consequence would be that all Paton's checks must have been adjudged private. For no definite meaning could be attached to the addition of those letters without the aid of parole testimony. But the fact that this appeared on its face to be a private check is by no means to be conceded. On the contrary the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction: to which must be added the circumstances that the cashier is the drawer and the teller the payee; and the form of ordinary checks deviated from by the substitution of to order, for to bearer. The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction."

The cashier acts for the bank in the capacity of a general agent, and if it is shown that his acts are done in the exercise and within the limit of the power delegated, such facts are inquirable into by a court and jury.

Any form of check may be used by the cashier for the purpose of transferring the funds of the bank, and the drawee may honor it, but if it fails to show any marks or words to indicate the corporate name of the institution, under the holding of the court in the case above referred to, parole evidence would be inadmissible to show its status, therefore, it should be signed by the cashier, not in his individual capacity, but in his official capacity.

While the form may not, as stated, be essential, when properly drawn it removes all suspicion and must be honored immediately on presentation.

A cashier may, by letter, addressed to a corresponding bank, direct that the bank's account be charged with a certain sum, or payment be made to a certain person, or that a remittance be made by the bank to a certain person or bank; such written instructions are frequently used and operate as a check upon the bank's account; but a cashier's check, which is drawn and delivered to a person and which becomes transferable, should bear on its face all the essential elements marking it as an instrument free from suspicion and doubt as to its genuineness. The form, therefore, and the essential requisites, may be important to the holder of the check, but if lacking any of these essentials and it can be shown that the cashier was acting in his official capacity, the bank will be held responsible for the same.

The cashier's check, when drawn upon his own bank, is an acknowledgment of the fixed indebtedness due by the bank; and, unlike other checks, in this particular, the holder is not required to present the same for payment within any specified time.

It being an acknowledged indebtedness of the bank, it may be presented for payment at any time before being barred by the Statute of Limitation.

§ 132. Power to receive offers for the purchase of bank securities.

As a general agent of the bank the cashier has the authority to receive offers of purchase for the property or securities belonging to the bank; but he is not authorized to dispose of, or sell such securities without an order from the board of directors.

The Supreme Court of the United States, in the case of First National Bank of Xenia, Ohio, Plaintiff in Error, v. Daniel M. Stewart and Martha A. McMillan, Admrs. of the Estate of Daniel McMillan, Deceased, 114 U. S. 224, holds that it is within the scope of the general authority of a cashier to receive offers for the securities of the bank, and to state whether or not the bank owns securities which a customer wanted to buy.

His statement to a person who was in treaty to purchase that the bank was not the owner of a certain security in his manual possession as cashier, was clearly within the line of his duty and was binding on the bank.

§ 133. Cashier has inherent power to deal in bills of exchange. A bill of exchange is "A written order from one person to another, directing the person to whom it is addressed to pay to a third person a certain sum of money therein named."[3]

"A foreign bill of exchange is one which the drawer and drawee are residents of countries foreign to each other."

In this respect the States of the United States are held foreign to each other.[4]

An inland bill of exchange is one of which the drawer and drawee are residents of the same State or country.[5]

A cashier has the inherent power to buy and sell foreign or inland bills of exchange.

The National Banking Act, by provisions of section 5197, Revised Statutes of the United States, authorizes national banks to purchase, discount or sell a *bona fide* bill of exchange.

It is not a violation of the National Banking Act for a cashier to discount bills of exchange drawn in good faith against actually existing values, though the amount exceeds the amount, which by the law may be loaned to any one person. It is not construed as money borrowed.

Dealing in bills of exchange is a part of the business of banking and it becomes the duty of the cashier in the purchase and sale of the same to endorse them over to the buyer.[6]

If the bank's charter being a savings bank, forbids this branch of the business, the cashier has no authority to buy and sell bills of exchange, but should he do so, in violation of the charter, or the direction of the board of directors, the presumption of his authority, without notice to the contrary to a customer, will bind the bank.

The cashier of a national bank, being authorized to buy

3 Wood Byles on Bills, 1.

4 Dickens *v.* Beal, 10 Peters 572; Phoenix Bk. *v.* Hussey, 12 Pick. 483; Green *v.* Jackson, 15 Me. 136; Armstrong *v.* American Ex. Bk., 133 U. S. 433.

5 Ragsdale *v.* Franklin, 25 Miss. 143.

6 Fleckner *v.* United States Bank, 8 Wheat. 338; Bank of New Haven *v.* Perkins, 29 N. Y. 554.

and sell bills of exchange, a national bank may charge the rate of interest allowed by the State, or a rate that may be allowed to State banks of issue.

§ 134. Cashier has charge of personal property.

The cashier, by the very nature of his office, has charge of all the personal property of every nature belonging to the bank; and is held to a strict account for the same.

He has full charge of the cash. Chief Justice Mitchell holds that he should be able to give an account of the same at any time when called upon to do so.

If he is charged with the responsibility of giving an account of the cash of the bank at any time, inherently he is endowed with the power of paying all the lawful demands when due and presented against the bank. He may open an account with a customer or refuse the same. Being held accountable for the cash, he may open an account, and select a correspondent bank and deposit with such bank such portion of the funds or cash, as in his judgment is prudent and for the best interests of the bank. Having authority to select a correspondent, and establish such a depositary for the bank, he has authority to withdraw the same at any time.

He is also charged with the care and safe keeping of all the notes, bonds, bills and other securities and valuable papers belonging to the bank; and may, when the necessity arises, during the ordinary course of business, sell, transfer and dispose of the same, and, it will be presumed, until the contrary is shown, that he sold the same on behalf of the bank and was authorized to do so by the directors, or that they ratified his act.[7]

The inherent powers of his position, holding him responsible for and, placing in his charge, all the personal property of the bank, and the auxiliary power, when the necessity arises to surrender and transfer notes, fixes a very great responsibility upon him and the office.

Having charge of the personal property of the bank, a person dealing with him in his capacity as cashier, may assume

7 Hawkins *v.* Fourth National Bank, 49 N. E. 957; Wild *v.* Bank of Pasa Maquoddy, 3 Mason 505; Story on Agency, § 114; Jones *v.* Hawkins, 17 Ind. 550, 559; Ryan *v.* Dunlap, 17 Ill. 40.

that he has authority to dispose of the property, and in the ordinary transactions and dealings with him, such person is not required to inquire into the limitations or restrictions placed upon him or his authority.

If, however, the transactions of the cashier in the disposition of property belonging to the bank, raises a doubt as to his authority to do and perform the act; it would be the duty of the person dealing with him to investigate and inquire into his authority.

In the case of Franklin Bank v. Stewart, 37 Me., 519, the court in discussing the powers and duties of agents and referring to the power of a cashier, says that : "When a bank presents its cashier as habitually performing certain acts or duties, these may be regarded as official acts or duties, and for the performance of them he may be considered as its general agent." [8]

§ 135. Power to indorse negotiable paper.

The power of the cashier to indorse negotiable paper of the bank is inherent in the office; and it becomes his duty, when so required, to make the indorsement and transfer such paper.

The power to transfer paper for collection is one which authorizes the cashier to indorse the same.

The various forms (or language) employed in the indorsement of negotiable paper is important.

There are several variations of the simple indorsement "for collection," evidencing the same intent to retain title in the indorser.

For example, an indorsement in the following form "For collection for account" of a certain person named does not pass the title to the paper.[9]

Nor does the indorsement which reads as follows, "Pay to B or order, for account of C" pass the title of the paper.[10]

Neither do the indorsements, "For collection on account," or, "For collection and credit," pass the title of the paper.[11]

[8] Franklin Bank v. Stewart, 37 Me. 519.

[9] First National Bank of Crown Point v. First National Bank of Richmond, 76 Ind. 561.

[10] White v. National Bank, 162 U. S. 658.

[11] Armstrong v. National Bank of Boyertown, 90 Ky. 431.

It is held, however, in the case of Fawsett v. National Life Insurance Company, 5 Ill., App. 272, that an indorsement made by the payee in the following form, "Pay to the Second National Bank of M for collection of account of H, executor of A, deceased," passes the title to the paper.

If the indorsement is made by the cashier in his individual capacity, it may become a question whether the transaction is one which will bind the bank. As previously stated in the discussion of the question as to the individual or official signing of the signature of the cashier, an indorsement signed by him in a personal capacity may raise the question of fact. Is the signing a personal or, an official act? If it can be shown that it was a bank transaction, the bank is bound by the language of the indorsement.

§ 136. Indorsement for accommodation.

The cashier of a bank has no inherent authority to indorse paper of another in behalf of the bank, for accommodation. Neither can this power be conferred upon a cashier by the board of directors. The bank has no authority to enter into such transactions.

There are certain limitations placed upon him as cashier in the indorsement of paper belonging to the bank, but he has the right inherently in his office to indorse for collection and discount, but has no authority to transfer judgments standing in favor of the bank. His authority in this respect only extends to negotiable instruments. The president and directors are the only persons who can legally make a transfer of a judgment; and where the cashier acts as their agent, it should appear in evidence.[12]

It has been held in the case of Crockett & Harper v. Young *et al*, 1 S. M. & M. (Miss.) 214, that the cashier has the authority under the direction of the board of directors to indorse negotiable paper in payment of the bank's debts.

This power, under direction of the board of directors, authorizes the cashier to settle with all legitimate creditors of the bank while the same remains solvent, by assigning to them the negotiable promissory notes of the bank.

[12] Holt *et al. v.* Bacon *et al.*, 25 Miss. 567.

The question, plainly stated, is, can a bank transfer its securities to depositors in settlement of their deposits?

The cashier has no inherent power or implied authority to make transfers or assignments of the bank's negotiable instruments for this purpose, but, under authority by the board of directors, he may assign and deliver negotiable notes to any depositor of the bank in payment and settlement therefor.

In the case of Schneitman v. Noble, 75 Iowa, 120 (39 N. W., 224), the court holds that in the absence of a more special authority, the cashier would be restricted in his power, to bind his principal to the doing of such acts as are usually performed by persons who occupy the position he held.

The court holds in this case that in the absence of proof of special authority which the cashier did not have, he was devoid of the power inherently in his office to settle with depositors, by transferring to them promissory notes or other securities of the bank.

The opinion denies the inherent power upon the following grounds, that the agent cannot bind his principal "only by acts done in the usual and ordinary course of business."

We find then that the law establishes the rule to be that the cashier of a bank may, without special authority from the board of directors, transfer and indorse the negotiable paper of the bank in its ordinary course of business; but that he is precluded from making such indorsements with the intent and purpose of settling with a creditor or depositor of the bank, and that before such settlements are made, direct or special authority must be obtained, or his acts afterwards ratified by the board of directors.

The rule, as laid down and universally adopted and sustained by the courts, cannot be questioned, and possibly should not be in any way criticized, but it is certainly open to discussion, as stated, the rule gives the cashier the inherent power to assign and indorse all negotiable paper belonging to the bank in the ordinary transactions which may daily occur.

The cashier of the bank is inherently endowed with the power to receive or reject a deposit. He may also at any time upon demand, and when requested so to do, repay such deposits. He has the inherent power to repay a deposit before

a demand is made for the same and settle the account with the depositor.

As cashier of the bank he may under direction make discounts, and perform all other acts necessary, and relating to the notes and personal property belonging to the bank. His power in all these respects is not limited by restrictions or directed by special authority from the board of directors. They are powers, as stated, inherent in the office. It becomes his duty to pay deposits upon demand and to pay the same in current funds. While this is the rule, and one which, in nearly all cases, the depositor would insist upon being fulfilled, we can conceive of no reason or law prohibiting the cashier through the inherent power in his office, from transferring a negotiable instrument of the bank if at the time of the transaction the bank is solvent, to the depositor in payment of his deposit.

The cashier cannot settle with a depositor in this manner without his consent, as all deposits, when repaid as previously stated, must be paid in current funds. The transaction, therefore, is one which, if the depositor accepts, agreeing to take in lieu of current funds the assignment of a note belonging to the bank, no one should be heard to complain.

§ 137. Cashier's powers and duty when "run on bank."

When a run occurs upon a bank the powers of the cashier, in relation to the property of the bank, are not changed or in any way affected. All the rights inherent in his office, or special powers conferred upon him by the board of directors, or granted to him by the charter and by-laws of the corporation are such as must, during such dangerous periods, all be put in use.

A run may occur at any time. It is frequently induced or occasioned by a false report put into circulation by some enemy of the bank or suspicious person.

When the bank is being run by its depositors, and they are demanding the immediate payment of their deposits; the cashier being usually in charge and the executive officer of the bank, and having under his control and direction all the funds of the bank, he has the inherent power to put into exercise every usage, custom, privilege, and law, in order to protect the in-

terests of the bank; and see that no depositor or creditor obtains a preferred position or right over another creditor equally entitled.

In such an emergency the cashier may personally take charge of all the affairs of the bank to the extent of examining into each transaction as it may occur. He has the power to refuse payment upon the presentation of a check, until sufficient and reasonable time is given to ascertain that the account upon which the check is drawn is in sufficient funds to pay the same; and not until such examination of the drawer's account, can the holder of the check insist upon payment. In a previous chapter the case of Marzetta v. Williams, was cited to show that the cashier was entitled to a reasonable time in which to make examination and payment of a check when so presented.

The cashier, as stated, being held responsible for all the funds of the bank, is entitled to know personally that the drawer of a check is in funds and is entitled to payment. To obtain this information requires time for the purpose of examining the account of the drawer.

In the settlement with the drawer of the check and payment of the same, the person to whom the funds are to be paid, are entitled to receive payment in "current funds."

The cashier has no right to purposely delay the payment of a check when properly drawn and presented for payment, if the drawer has the funds deposited in the bank to his credit at the time of presentation sufficient to pay the same. But he may take sufficient time to satisfy himself as to the condition of the drawer's account, and being satisfied as to his right, it then becomes the duty of the cashier personally, or through the paying teller of the bank, to pay the same.

It then becomes the duty of the cashier, under such extraordinary conditions affecting the bank, to act with great care and deliberation. More than ordinary care and supervision is demanded of him in such an emergency. His duties are at all times burdened with responsibility, but when the bank's credit and life is in jeopardy, his duties become very strenuous, and his powers under such emergencies affecting the bank are enlarged, and he may, in order to preserve the bank's credit and safety, make discounts, assign notes, bills of exchange, and

pledge of securities of the bank and when authorized borrow money to meet the immediate demands of the bank.[13]

If his function or right to borrow money is divested and the right alone is in the board of directors, though during such an emergency, he cannot borrow money for the bank.

§ 138. Cashier borrowing money — Inherent power.

This is a power that many cashiers assume and exercise, but the authorities do not agree that it is inherent in the office. The principals of law do not sanction it as an inherent power in the office. Some of the leading authorities, however, lay down the rule without qualification or restriction and say that the cashier may borrow money on behalf of the bank, and that this power is inherent in the office most of the authorities justify and sanction this extraordinary authority by simply stating that custom and usage in the banking business authorize it.

It is necessary in the presentation of this important question, to ascertain the true position and rights of the cashier in this particular. He is the executive officer of the bank. He is in charge of, and is held responsible for the cash and all the personal property of the bank. He can accept or refuse accounts. He can loan money by the order of the board of directors and take notes. He can buy and sell notes, foreign and inland, bills of exchange. He can certify checks for others, but not his own check. He can issue letters of credit, certificates of deposit, attend to the transfer of stock, indorse notes for collection, employ an attorney to make collections, all of which powers inherently belong to the office of cashier, but the right to borrow money for the bank certainly is not an inherent power belonging to the office.

In the discussion of this important question, and in order to determine his rights, it becomes necessary to examine the leading authorities upon the subject.

It should be understood that there is no contention upon the question as to the power of the bank, when acting through its board of directors, to borrow money for the corporation, providing it acts within its corporate authority and the law.

13 City National Bank *v.* Chemical National Bank, 80 Fed. Rep. 859; Barnes *v.* Ontario Bank, 19 N. Y. 152; Sturges *v.* Bank of Circleville, 11 Ohio State, 153.

The question here discussed is, *has the cashier the inherent power to borrow money for the bank?*

In presenting the question it also becomes necessary to determine to what extent are the rights and powers of corporations in this particular.

The borrowing of money by a corporation is the creation of a debt therefore the question reduces itself to one stated as follows: When and how may the corporation (bank) borrow money? Does a custom or usage authorize a corporation, through one of its executive officers, without authority from its board of directors, to create a debt?

Banking corporation are institutions, organized and authorized by law. A national bank derives all its powers from the laws enacted by Congress, and their powers are limited to the express provisions of law and such incidental powers as are necessary in the conduct of their business.

The statute governing national banks is silent upon the question of power of a national bank to borrow money; but it has been held that it has incidentally the power and that this power may be used. This question has been discussed in another chapter, under the title, "Banks borrowing money." The discussion there relates to the power of banks to borrow, while here the question is the "power of the cashier to borrow."

In the case of Western National Bank v. Armstrong, 152 U. S. 346, the court, in discussing the power of an executive officer of the bank to contract an indebtedness, where it has been shown that the vice-president of the bank, without authority from the board of directors, had borrowed the sum of $200,000, says: *"It cannot be pretended as such that he, the vice-president, had power without authority from the board to bind the bank by borrowing $200,000 at four months' time." And upon the question as to the authority of the bank, though acting through its board of directors to borrow, the court says: "It might even be questioned whether such a transaction would be within the power of the board of directors."* We find the supreme Court of the United States authoritatively declaring the law to be that an executive officer of the bank has no authority to bind it or borrow money for its use, without the authority of the board of directors.

The inherent authority of the cashier to borrow money for

a national bank, is denied by the Supreme Court of the United States.

The court, in its opinion, further states: "Nor do we doubt that a bank, in certain circumstances may become a temporary borrower of money, yet such transactions would be so much out of the course of ordinary and legitimate banking as *to require those making the loan to see to it that the officer or agent, acting for the bank, had special authority to borrow the money.*"

The law of the Supreme Court of the United States, as it stands at the present time, upon the inherent power of an executive officer of a national bank, to borrow money, is, that he has no inherent power; that such power can only be used by him by authority and under direction obtained from the board of directors.

State banks (so-called), are organized under special banking laws, or under the general incorporation laws enacted by the Legislature of the various States. Where a banking corporation is incorporated under such general or special laws, and the law restricts such corporation in, or provides how, debts may be created, no debt of any such corporation is valid or binding upon it unless all the necessary steps in conformity to law are taken; and a cashier of any such banking corporation has no inherent power to bind it by borrowing money, which act is creating a debt, unless such power is conferred upon him by the directors.

In view of the fact that the Supreme Court of the United States has declared the law to be, that under the National Banking Law the cashier or executive officer has no power inherent in his office to borrow money for the bank, it is deemed advisable to review some of the leading cases of the State courts which have held that the cashier has power as a general agent of the bank inherently in his office to borrow money for the bank. In a leading case determined by the Supreme Court of the State of Illinois, Mr. Justice Sheldon, delivering the opinion of the court, sustains the Appellate Court, which holds that where the cashier of a bank is also the general manager of the same, and that it was one of the usual customs or operations of the bank, in the vicinity or town in which the bank was located, to borrow money on time

and execute a note therefor, that such person while acting as cashier and manager for the bank, who borrowed in its name a certain sum of money and executed and delivered a note, held: that the bank was liable.[14]

It must be noted that in this case the cashier was also shown to be the general manager of the bank, and was proven to be the general agent of the bank and at the time of the execution of the note by the cashier it was shown that the bank was a private banking institution, not incorporated under any law of the State and therefore not under the same limitations and restrictions as to the creation of debts imposed upon incorporated banking companies.

An early and leading case frequently cited as giving inherent power to the cashier of a bank to borrow money is the case of Barnes v. Ontario Bank, 19 N. Y. 152. In this case it appears, that the cashier and chief financial officer of the bank issued certificates of deposit of the bank and delivered the same to one Hollister who had no funds in the bank, but who was directed by the cashier to negotiate the certificates. The agent, Hollister, indorsed the certificate and procured a third person to sell it. The questions presented in this case are:

1. Did the bank have power to borrow the money?
2. Was the cashier the proper agent to execute that power without any special delegation of authority thus to act?

The court says: "That the power to borrow existed was determined by this court upon the fullest examination in the case of Curtis v. Leavitt, 15 N. Y. 9. That the cashier in virtue of his general employment, could exercise the power, was not denied upon the argument and the proposition does not admit of a reasonable doubt."

"In the next place, if the bank could borrow money, it could execute and deliver an assurance or undertaking for the payment of the sum alone in any form not forbidden by the terms or just interpretation of some statute of this State. This was also settled in the case above mentioned. There is no pretense that these certificates of deposits, payable, as they were, on demand, fall within any of the restraints imposed by law upon the banking institutions of the State. They were, therefore,

[14] Crain et al v. National Bank, 114 Ill. 516.

valid instruments, so far as any question of corporate power to issue them is concerned."

The law of the State as it existed at this time authorized the cashier to draw and sign certificates of deposit, and it appearing that this particular certificate of deposit, being authorized by law and having passed into the hands of an innocent purchaser, without notice of the fact, that Hollister, to whom the same had been issued, had made no deposit in the bank representing the same, the bank was rightfully held responsible.

The court, in further discussing the question, says: "The cashier, therefore, in issuing such instruments, acted under his authority, and in so doing, he wielded the power of the corporation itself. The corporation, therefore, cannot be permitted to repudiate the obligation on the mere ground that it was not duly executed."

It must be noted that the law authorized the cashier to draw certificates of deposit, but the assumption is always that they are drawn upon a deposit which has previously been made by the owner of the certificate. It cannot be contended that it is a transaction in the nature of creating a debt as debts are usually created, namely, by executing a promissory note, and therefore this case, when cited in support of the inherent power of the cashier to borrow money, is not in point.

In the case of Ballston Spa Bank v. The Marine Bank and others, 16 Wis. 125, the court, in discussing the inherent power of the cashier to borrow money, disposes of the question as follows: The court says, "It was competent for the cashier, *as agent for the board of directors*, to execute the promissory notes in question and bind the bank for such execution. Whether, then, the cashier has *prima facie* authority by virtue of his office, or whether absolute, or whether, still, the parties seeking to charge the bank through his act, must give evidence that he was expressly authorized by the board of directors, we need not now inquire. A subsequent ratification is equivalent to a previous expressed authority."

The court very carefully and purposely refrains from declaring that the cashier has inherent power to execute promissory notes and borrow money for the bank, but very correctly states and emphasizes the law to be that if such notes are issued, *a subsequent ratification is equivalent to a previous express authority.*

A recent and very important case, discussing this question, is the case of City National Bank v. Chemical National Bank, 80 Fed. Rep. 859. The importance of this case demands that the opinion of the court should be given in full.

Opinion:

In this suit by the Chemical National Bank of St. Louis, Mo., against the City National Bank of Quanah, Tex., the plaintiff by its petition sought to recover against defendant on certain promissory notes executed by the defendant bank through its cashier, William F. Brice. There was also an account in the petition for money loaned, covering the same transaction as that embodied in the notes. The City National Bank defended on the ground that the action of Brice was not its action, and that it never made the loans or executed the notes, and that the transaction by Brice was for his personal benefit, and did not inure to the benefit of the bank in any way. The record discloses the fact, which is undisputed, that Brice was the cashier of the City National Bank, and that in 1894 he applied to the cashier of the Chemical Bank for accommodations, proposing to keep a balance in the Chemical Bank, and to send it the collections in St. Louis of the City National Bank. Brice also sent to the Chemical National Bank, to be used for comparison, what he represented to be, and what purported to be the signatures of the officers of the City Bank; also what purported to be a resolution of the directors of the City Bank, authorizing him as cashier to borrow from time to time, and to rediscount with the Chemical Bank, the whole or any part of $10,000, and to deposit as collateral paper made by the customers of the City National Bank. The correspondence resulted in an agreement between the cashiers of the two banks, and on August 27, 1894, a note for $5,000 was sent by Brice to the Chemical Bank. This note was signed "City National Bank, by William F. Brice, Cashier," with the seal of the bank affixed. Certain collateral, amounting to $7,640, consisting of what purported to be notes payable to the City Bank, was forwarded with this note. Subsequently a note similarly signed was made on September 27, 1894, for a like amount, with which collateral, or what purported to be collateral, amounting to over $8,000, was placed. The proceeds of these notes, when discounted by the Chemical

Bank, were placed to the credit of the City Bank, but unquestionably a large proportion of the amount was used by Brice for his individual benefit. Soon after these transactions 3,000 silver dollars were sent by the Chemical Bank, on a telegram requesting the same, signed "City National Bank," and this silver, according to the evidence, went into the vaults of the City Bank. There was considerable evidence in the case, but it need not be set out in detail, as the above statement embraces the material facts necessary to an understanding of the issues involved. The court directed a verdict, under all the evidence in the case, for the plaintiff, and the question presented is, was this action of the court right.

Not only did Brice, the cashier of the City Bank, have the usual powers of a cashier — of general management of the bank's business, as to loans, rediscounts, etc.— but the testimony of the president shows that the actual management of the City Bank was left almost entirely to Brice after April 2, 1894. Brice seems to have been left by the president and directors of the bank, in connection with his son, as assistant cashier, in full control of the bank's business. The letters written by Brice in reference to loans from the Chemical Bank, and all the correspondence, were on the regular letter paper, and what was purported to be a copy of a resolution of the directors authorizing the loan. There was printed on all the paper so used this heading:

The City National Bank. Capital $100,000.
G. S. White, President. J. W. Golston, Vice President.
Wm. F. Brice, Cashier. E. H. Brice, Asst. Cashier.

While it appears to be true that the signature of the president, though a good imitation of his genuine signature, was a forgery, and while what purported to be a resolution of the board of directors was also a forgery, there was nothing whatever to excite the suspicions of the officials of the Chemical Bank as to their genuineness. The action of Brice was within the general scope of his duties as cashier of the bank, and there was nothing whatever in it calculated even to arouse inquiry as to Brice's honesty, and as to the transaction being made in good faith on behalf of the City Bank.

Any authority that may be found to the effect that rediscounting the bank's paper does not come within the scope of the powers of the cashier of a bank would not be applicable to the facts here. There is evidence in this case to show that it was customary for similar banks in Texas, during certain seasons, to borrow money this way. Considering the amount and character of these loans, and the whole nature of the transaction with the Chemical Bank, there was nothing done, as it appeared to the Chemical Bank that Brice could not legally and properly do. The cases of Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, and Chemical Nat. Bank v. Armstrong, 13 C. C. A. 47, 65 Fed. 573, are not applicable, on their facts, to this case. The character and amount of the loans, and the manner in which they were made in both of these cases, were such as might well have raised suspicion as to the regularity and *bona fide* character of the transaction. In this case the negotiations and all the correspondence were such as might well lead the officers of the Chemical Bank to believe that Brice was acting on full authority, with perfect good faith and honest intention. The transaction with the Chemical Bank being, as we have stated, within the general scope of the duties of a bank cashier, and Brice having been placed by the authorities of the City Bank in a position and afforded facilities to enable him to make these loans as its representative, we do not see how the court could have done otherwise than direct a verdict, as it did in favor of the plaintiff on these notes. A sentence or two from leading authorities will indicate without multiplying citations, the law we think applicable to this case: "The cashier is the executive officer through whom the whole financial operations of the bank are conducted." Merchants' Bank v. State Bank, 10 Wall. 604. "The cashier has inherent power to borrow money in the regular course of the business of the bank, and may secure the loan by note or pledge of the bank's property." Morse, Banks, § 160. See also Mor. Priv. Corp., §§ 539, 597.

The first specification of error is that the court erred in admitting in evidence the notes executed by Brice as cashier of the City Bank to the Chemical Bank, without proof of execution, notwithstanding the plea of *non est factum*. They were admitted on an admission by defendant that Brice, who signed

them, was the cashier of the defendant bank, that the same were in his handwriting, and that the seal affixed was the genuine seal of the bank. There was no error in this.

The second specification of error is that the court erred in admitting in evidence what purported to be a copy of the resolution of the board of directors authorizing Brice to make these loans. There seems to have been no question but that Brice placed this paper, containing what purported to be the action of the board of directors, with the Chemical Bank, in connection with the loan transaction; and we think the paper was properly admitted, its weight and value as evidence to be afterward determined.

The third specification of error is that the court erred in refusing to instruct the jury to return a verdict for the defendant. In this the court was clearly right.

The fourth assignment of error is that the court erred in instructing the jury to return a verdict for the plaintiff. We think, on the whole case before the court, for the reasons we have heretofore given, that this instruction to return a verdict for the plaintiff was right.

The court having correctly directed a verdict for the plaintiff, the judgment based thereon should be affirmed; and it is so ordered."

The facts in this case show that the Chemical National Bank believed that Brice was acting under full authority, with perfect good faith and honest intention. Relying upon such authority and resolutions and believing them to be genuine, authorizing Brice to borrow the money, the court held that the City National Bank could not defeat the debt for lack of authority, while at the same time accepting the benefits resulting from the loan.

The rule as well known and unquestioned is that the directors wield all the powers of the corporation for the purpose of conducting its business.

In the case of a ministerial officer of the corporation, such as the cashier of a bank, the power to borrow money must emanate from the board of directors and ought to be proven. The power, however, need not be proved by the production of the official records, but may be proved by circumstances.

The Supreme Court of the United States, in the case of Min-

ing Co. v. Anglo-California Bank, 104 U. S. 194, in discussing this question in connection with the provisions of the Civil Code of California, §§ 305, 354, says:

"It is equally clear that the board had as incident to the general powers conferred by law upon the company power to borrow money for the purposes of the corporation, and to invest certain officers with authority to negotiate loans, to execute notes, and to sign checks drawn against its bank account. And it is settled law that the existence of such authority in subordinate officers, may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceeding of the board. It may be established by proof of the course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the board charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinate in and about the affairs of the corporation."

That the cashier may be delegated with this power, or his acts afterward ratified, is not questioned; but we are unable to find an opinion of a court which goes to the extent (through custom or usage) of giving an unlimited inherent power in the cashier to borrow money.

§ 139. Inherent power to collect debts.

The cashier has inherent authority to collect debts due the bank, and to accomplish this purpose he may engage an attorney and agree to pay him a reasonable compensation for his services. His power in this particular is co-ordinate with that inherently given to the president of the bank.[15]

He may, of course, receive payment obtained from collections, but is not permitted to accept in payment anything but money.[16]

He has also authority to release a mortgage debt by a release duly executed in the name of the bank, or by a release

[15] Root v. Olcott, 42 Hun (N. Y.) 536; Young v. Hudson, 99 Mo. 1025.

[16] Piedmont Bank v. Wilson, 124 N. C. 561, 32 S. E. 889; Bank of Commerce v. Hart, 37 Neb. 197.

entered upon the record in the recorder's office, where such a release is authorized by statute.[17]

He has power to transmit notes for collection, but it has been held that he has no power to enter into a compromise with a creditor of the bank; and settle a claim in favor of the bank for a sum less than the actual amount of such claim.

When collateral security is held by the bank to secure a debt due the bank, when the debt is paid he has power to surrender and assign the collateral security to the owner.[18]

It has been held in the case of Bridenbecker v. Lowell, 32 Barb. (N. Y.), 9, that the cashier in the securing of a collection and debt of the bank may make a compromise of the claim, but this power strictly and properly belongs to the board of directors.

§ 140. Liability of cashier.

Lord Loughborough, in 1 H. Bl. 151, lays down the following rule: "If the man be in a situation or profession to imply skill, an omission of that skill is imputable to him as gross negligence." [19]

Where a cashier fails to notify the maker of a note, which is held by the bank, and the bank suffers a loss and an indorser through such negligence escapes liability, the cashier is liable to the bank, to the extent of the loss sustained.[20]

The cashier contracts to act in good faith and with entire honesty in transacting all the business of the bank, and to exercise as high a degree and skill as is generally exercised by business men in the management of such business; but he is not liable for honest errors in judgment, nor for the failure to take the utmost precaution possible in making investments for the bank.[21]

The cashier is liable in damages for an injury arising from his wrongful or unofficial act, or for a violation of the directions imposed upon him by the board of directors to perform.

"Thus it has been held that where losses occur to a savings bank through investments by the president in securities not

17 Ryan v. Dunlap, 17 Ill. 40.

18 Mathews v. Massachusetts National Bank, 1 Holmes, 396.

19 Story, Partnership, §§ 169, 170, 171, 173; Story, Agency, §§ 182, 184; 1 Parsons, Cont., 73, 74 and note; 20 Pick. 167.

20 Bidwell v. Madison, 10 Minn. 1.

21 Exchange Bank v. Gardner, 73 N. W. 591.

within the restrictions of the charter, by means of checks signed and left in blank by the treasurer, the president and treasurer are personally liable, the president first and the treasurer next. Williams v. McKay, 46 N. J. Eq. 25, 18 Atl., 824. An honest error of judgment while in the exercise of ordinary care does not make the president liable to the corporation. Gubbins v. Bank of Commerce, 79 Ill. App., 150. It has been held that, although he should have consulted the board of directors before authorizing certain expenditures, yet if he acted in good faith and did no more than what they probably would have authorized, he was not liable to the corporation for damages. Davis v. Memphis City R. Co., 22 Fed. 883. It has also been held that a president of a national bank is guilty of no want of ordinary care, in accepting a leave of absence granted to him of one year on account of ill health and is not to be held for neglect of duty because he did not resign. Briggs v. Spaulding, 141 U. S., 132, 11 S. Ct. 924, 35 L. ed. 662. See also Movius v. Lee, 30 Fed., 298. It has been held, that the president of a corporation is liable, for allowing a debt of a corporation with which he is closely connected to accumulate until, the debtor corporation becomes insolvent, when it could have been saved by prompt action. Doe v. Northwestern Coal, etc., Co., 78 Fed., 62. But he cannot be held responsible for not defending a suit, where there is no good defense. Boston Tailoring House v. Fisher, 59 Ill. App. 400.

The cashier may be liable on his bond for making improper loans, although the by-laws of the bank provide, for the appointment of a committee, to control the making of loans.[22]

§ 141. Cashier responsible for subordinates, when.

It is the duty of the board of directors to employ all the subordinates and clerks of the bank, but in the very nature of the office of cashier, the tellers and bookkeepers are his subordinates and sub-agents, and only through improper or negligent performance of his duty as manager and superintendent of the bank, can he be held for the default or errors of his subordinates. He is only held as cashier to exercise such care

[22] Wallace v. Exchange Bank, 126 Ind. 265.

and supervision, as a man of ordinary prudence would do in the conduct and management of his own affairs.[23]

But where the cashier without authority from the board of directors or necessity, employs an assistant on his own account, and the assistant fraudulently embezzles the funds of the bank, the cashier having fraudulently concealed the fact of such embezzlement after it came to his knowledge, he is personally liable to the bank.[24]

§ 142. Cashier — Penalty — Liable, when.

The cashier of a national bank is prohibited by section 5187, Revised Statutes of the United States from countersigning or delivering to any association or to any company or person any circulating notes contemplated by this section, except in accordance with the true intent and meaning of its provisions.

It may be stated that this only applies to officers of the government.

Section 5207, Revised Statutes of the United States, provides that no association, shall hereafter offer or receive United States notes or national bank notes, as security, or as collateral security for any loan of money or for a consideration agree to withhold the same from use or offer or receive the custody or promise of custody of such note as security, or as collateral security, or consideration for any loan of money.

The law further provides that any officer or officers of any such national banking association, who shall make any such loan, shall be liable for a further sum equal to one-quarter of the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit.

The object of the provision of this law is designed by the government to prevent the locking up of money.

Section 5209, Revised Statutes of the United States, provides a penalty for the embezzlement, abstraction or willful misappliance of any of the funds, moneys or credits of the association, and declares that every person who makes any false entry in any book, report or statement of the association, with intent to injure or defraud the association, or any other

23 Batchelor v. Planters' National Bank, 10 Rep. 16 (Ky. 1880).

24 Vance v. Motley, 92 Tenn. 310, 21 S. W. 593.

company, body or politic, or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed by the Comptroller to examine the affairs of any such association with intent to defraud the same, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten.

Section 5437, Revised Statutes of the United States, provides a penalty for officers, meaning thereby any director, president, cashier, officer or other agent of the corporation, in using notes, etc., of closed banks, and declare that if any person knowingly aids in such act he shall be punished by a fine of not more than ten thousand dollars, or by imprisonment not less than one year nor more than five years, or by both such fine and imprisonment.

Section 5497, Revised Statutes of the United States, provides a penalty against every banker, broker or other person not an authorized depositary of public moneys, who knowingly receives from any disbursing officer or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation with or without interest, or otherwise than in payment of a debt against the United States, or who uses, transfers, converts, appropriates or applies any portion of the public money for any purpose not prescribed by law and every president, cashier, teller, director or other officer of any bank, or any banking association, who violates the provisions of this section, are declared to be guilty of an act of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated or applied, and shall be punished as prescribed in section 5488.

A violation of this section constitutes embezzlement and all banking institutions not public depositaries are subject to the provisions of this section.

The fact that the cashier commits an act which is a violation of law, or an express statute, will not relieve him from liability, unless done under duress. Where the cashier obeys an order of the board of directors, which he knows to be illegal, and given by them for the purpose of defrauding the bank, he is held to be equally guilty, though he does not participate in the illicit gain obtained from the bank.

§ 143. Notice to cashier of bank — When notice to bank.

The general rule is that notice to the cashier, while acting as such for the bank, is notice to the bank.

The rule, as stated by the court in the case of First National Bank of Mason v. Ledbetter, 34 S. W., 1042, is as follows: "The cashier of a national bank is the executive officer of the bank and his acts, done in the ordinary course of business, bind the bank, and notice to him is notice to the bank."

Where the cashier of a bank conspires with a third person to sell worthless property to defendant at par, in order that the proceeds may be applied to the payment of a debt due the bank, the bank is chargeable with the knowledge that the cashier had of such conspiracy.[25]

Notice to the cashier of an incorporated bank that a note discounted with the bank was procured by fraud, is notice to the bank, so that the defense is available against it.[26]

It is also held that knowledge by one of the officers of a bank, who joined in the acceptance for the bank of a negotiable note before due, of a fact which would put a prudent person upon inquiry as to the power of the maker to execute the paper, is sufficient to charge the bank with notice of a disability, if such existed.[27]

The knowledge of a cashier and two directors that he, the cashier, has without authority, pledged the bank's responsibility upon the note of the corporation, in which such officers have an interest adversely to the bank, is held not notice to the bank.[28]

In the case of Winslow v. Harriman Iron Company, 42 S. W. 698, where a holder of bank stock placed it in the hands of the bank's cashier for negotiation, and the cashier obtained a loan on the stock, and was told by the owner to remit the proceeds to him, the owner was at the time indebted to the bank, and the cashier, without authority, deposited the proceeds in the bank, by which it was appropriated in payment of the indebtedness, held by the court that the bank was charged with notice of the cashier's fraud and could not make the appropriation.

[25] Merchants' National Bank *v.* Tracy, 29 N. Y. S. 77.

[26] Citizens' Savings Bank *v.* Walden, 52 S. W. 953.

[27] Hager *v.* National German-American Bank, 31 S. E. 141.

[28] Fort Dearborn National Bank *v.* Seymour, 73 N. W. 724.

The cashier having been given full authority to make discounts, it cannot be contended in behalf of the bank that notice to the cashier is not notice to the bank in the discounting of notes.[29]

Where the articles of incorporation of a bank provided that "it is to act as an agent in the investment of funds," and "to transact any business that may properly be done by a financial agent;" and the cashier of such bank made a loan for a customer who had money deposited therein, and took the acknowledgment to the mortgage securing the loan, and had possession of the unrecorded mortgage, and received two installments of interest, which he placed to such customer's credit on his pass book; Held, that the knowledge of its cashier was the knowledge of the bank, affecting it with notice of such unrecorded mortgage.[30]

In the case of Loring v. Brodie, 134 Mass. 453, the court holds that if a cashier of a bank receives securities on a loan from the bank to a trustee, with knowledge that the securities belong to a trust, the bank is affected with the knowledge of its cashier, and is put upon inquiry as to whether the trustee has authority to pledge the securities. The court, in its opinion, says: "If he received the securities with a knowledge that they were wrongfully transferred and were the property of others, his knowledge must affect the bank. His attitude and relation were such that it was his duty to communicate this information to the bank; and it cannot be deemed that he was a mere channel of transmission, and that his knowledge is to be treated as affecting only himself. Although he was the attorney of Brodie, in taking care of and managing the trust property, he was the cashier also and there was a confidence reposed in him as such which makes his knowledge the knowledge of the bank."

This doctrine is supported by the Supreme Court of the United States in the case of Duncan v. Jaudon, 15 Wall. 165, where the court holds that notice to the cashier of a bank that the stock pledged is trust stock, is notice to the bank.

The rule is again laid down as follows: "The knowledge of

29 Merchants' & Planters' Bank *v.* Penland, 1 B. C. 25.

30 Christie *v.* Sherwood, 113 Cal. 526, 45 Pac. Rep. 820.

an authorized agent acquired in the course of a given transaction within the scope of the agent's authority, is the knowledge of the principal."

The knowledge of the cashier of a bank of a defense to a promissory note, if acquired in the course of the transaction which results in the discounting of the note, is the knowledge of the bank, and will deprive it of the position of an innocent holder for value.[31]

A bank is not chargeable with notice of the misappropriation of money by its cashier, acting as agent for a third party, in his individual capacity; nor is it liable to the principal for such money when it receives no benefit therefrom.[32]

Where the cashier of a bank is also the secretary of another corporation, and while working in the interest of the latter, sold stock therein, taking the purchaser's note therefor, which note was afterward discounted by the bank. Held, that the bank is not affected with its cashier's knowledge as to the value of the stock sold, obtained through his connection with the other corporation.[33]

It is held in the case of Drovers' National Bank v. Potvin, 74 N. W. 724, which case was appealed from the Supreme Court of the State of Michigan, that where a bank had no committee or agent to make loans, excepting their cashier, evidence that he had no knowledge that a note indorsed to them for value was procured by fraud, is *prima facie* sufficient to show want of such notice by the bank.

In the case of Indian Head National Bank v. Clark, 43 N. E. 912, the court, in discussing the general rule of agency, applicable both to corporations and to natural persons, which he defines as follows, is that "notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal," the court says, "that there is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is the circumstance that the agent, while acting for his principal,

31 National Bank of Bedford *v.* Stever, Appellant, 169 Penn. St. 574; Burmingham Trust Co. *v.* Louisiana National Bank, 99 Ala. 379; Niblack *v.* Cosler, 74 Fed. 1000.

32 100 Fed. Rep. 705.

33 Benton *v.* German American National Bank, 26 S. W. 975.

is at the same time committing an independent fraudulent act upon his own account which makes the case an exception to the general rule." [34]

§ 144. Cashier's declarations and admissions.

The rule is that the declarations or admissions must be made officially and within the scope of the agent's duties to bind the bank.[35]

A declaration or admission made beyond the scope of his authority will not bind the bank.[36]

The cashier of a bank ordinarily has no authority to discharge its debtors without payment, or to bind the bank by an agreement that a surety should not be called upon to pay a note he has signed, or that he would have no further trouble from it.[37]

Where the cashier attempts to answer as to the genuineness of paper, and the responsibility of the makers or indorsers in which the bank has no interest, and is not in any way affected thereby, the act is beyond his authority.

Where a check drawn upon the bank is presented to the cashier and he says "it is good," held that the bank is bound as to the signature and the sufficiency of funds, but the bank cannot be held as to the genuineness of the filling in.

The Supreme Court of the United States, in the case of Espy v. Bank of Cincinnati, 18 Wall. 1-604, says, "The answer he gave that the check was 'good,' or was 'all right,' must be supposed to be responsive only to these two points. The genuineness of the payee's name and of the sum filled in the body of the check were as well known and as easily ascertainable by the payees themselves as by the bank officer, and unless the inquiry was so framed as to call his attention to these points, he had no reason to suppose, in the nature of the transaction, that he was expected to give information in regard to them. So the response of 'good' should not on sound principle be held to extend to them. He was under no moral or legal obligation to give an opinion on these points. He had no reason

[34] Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 278, 17 N. E. 496.

[35] Sturges v. Bank of Circleville, 11 Ohio St. 153.

[36] Goodbar v. National Bank, 78 Tex. 461, 14 S. W. 851; Bank of the Metropolis v. Jones, 8 Peters, 12.

[37] Bank v. Haskell, 51 N. H. 116.

to suppose that he was asked for such an opinion, and because he did give an opinion that the check was good in the only points of which he knew anything, it would be illogical to hold the bank liable on the ground that the response meant good absolutely and for all purposes."

The Supreme Court of Nebraska, in the case of Grant v. Cropsey, 8 Neb. 205, holds that it is a firmly established rule that when one by his words or conduct willfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.[38]

Where the cashier admits that the drawer of the check has sufficient funds to pay the same, the bank is bound. It is an act within the scope of his authority and is equivalent to the verbal certification of the check.

Where a cashier was asked about the solvency of a firm and he reported that the firm "was good, was perfectly solvent," afterward the firm failed and it was shown that at the time of the inquiry the firm was insolvent and the bank, with the bankrupt, was sued, held that the bank was not responsible for the statements of the cashier; that he was not employed by the bank to give such information.

"A cashier of a bank who is also a director of a manufacturing company, and as such director assisting in promulgating false statements as to the financial condition of the company, for the purpose of defrauding all of its creditors, including the bank, was not the agent of the bank in such matter so as to affect the validity of its claims against the company."[39]

§ 145. Cashier's acts away from bank.

A cashier may draw checks while away from the bank; and may also indorse paper while away from the bank.[40]

He may also pay or certify checks away from the bank.[41]

[38] Pickard v. Sears, 33 Eng. Com. Law Rep. 469; Davis v. Handy, 37 N. H. 65; Merchants' Bank v. Rudolph et al., 5 Neb. 527.

[39] Hadden v. Dooley, 92 Fed. Rep. 274.

[40] Bissell v. First National Bank of Franklin, 69 Pa. St. 415.

[41] Bullard v. Randall, 1 Gray (Mass.) 605.

If the cashier can bind the bank by representations made while in the bank, he may, while absent, if representing the bank and upon the bank's business, bind it.[42]

§ 146. Limitation of power.

Ordinarily the cashier of a bank has no authority to discharge its debtors without payment, or to bind the bank by an agreement that a surety should not be called upon to pay a note he had signed or that he would have no further trouble from it.[43]

Under section 5136 of the National Banking Act the cashier of a national bank has no power to bind it to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it, and no action lies against the bank for its refusal to pay such a draft.[44]

Where a statute creating a banking corporation provides that its affairs shall be managed by a board of directors who shall have power to appoint and remove a cashier and other employees of the bank, the power to discharge a surety on a note cannot be exercised unless expressly delegated to him by the directors.[45]

The cashier of a national bank has not in the absence of special authority from the board of directors or a usage or practice so to do, power to receive on behalf of the bank property for safe keeping.[46]

The cashier has no authority by virtue of his office to bind the bank by certification of his own check. The certification is invalid.[47]

In the case of State National Bank v. Newton National Bank, 66 Fed. Rep. 691, it is held that a cashier of a bank has no implied authority, to bind the bank by a pledge of its credit to secure a discount of his own notes for the benefit of a corporation in which he was a stockholder.

A bank may become liable for the cashier's deceit.

42 Houghton *v.* First National Bank of Elkhorn, 26 Wis. 663.

43 Cochecho National Bank *v.* Haskell et al., 51 N. H. 116.

44 Flannigan et al *v.* California National Bank et al., 56 Fed. Rep. 959.

45 Peoples Savings Bank *v.* Hughes, 1 Mo. Att. 549.

46 First National Bank of Lyons *v.* Ocean National Bank, 60 N. Y. 278.

47 Gale *v.* Chase National Bank, 104 Fed. Reep. 214.

The cashier of a bank is the proper officer to receive deposits and to give certificates in respect thereto, which may properly include (with the consent of the depositor), a statement of the source from which the deposit arose; and for a false statement in that respect made to subserve the interests of the bank, the latter is liable in tort to one injured thereby, although the cashier was not expressly authorized to make such statement by the board of directors.[48]

The cashier has no power to release a security upon a note given to the bank.

He cannot execute or bind the bank by execution of a mortgage on the real estate of the bank.

The bank's property cannot be mortgaged only by resolution directing the same, emanating from the board of directors.

The cashier cannot plead the Statute of Limitation to his own note due the bank, unless the board of directors had knowledge of the due date of the note and knew it was unpaid.[49]

In the case of First National Bank v. Ocean National Bank, 60 N. Y. 278, it is held that a cashier of a national bank has no authority as such to receive special deposits, and thus bind the bank for their safe keeping. It is also held that a cashier cannot bind his bank by any contract, express or implied, concerning the taking of special deposits taken for the mere accommodation of the depositor, as such act is not within the authorized business of the bank.[50]

A cashier of a bank has no legal authority by virtue of his position to compromise a claim of the bank or to execute a composition agreement and release therefor. Such a power is discretionary, calling oftentimes for the exercise of considerable reflection and a high degree of judgment. It is strictly a sacrifice at least of nominal property of the bank, and is a function of the board of directors and not of an executive officer.[51]

48 Hindman *v.* First National Bank of Louisville, 112 Fed. Rep. 931.

49 Harrisburg Bank *v.* Forster, 8 Watts (Pa. St.) 12.

50 Wiley *v.* First National Bank, 47 Ver. 546; First National Bank *v.* Graham, 79 Pa. St. 106.

51 Chemical National Bank *v.* Kohner, 58 Howard Prac. Rep. 207.

CHAPTER XI.

PAYING AND RECEIVING TELLERS

§ 147. Functions of the paying teller.

The functions of the tellers, receiving and paying, are respectively to receive and pay out the moneys of the bank, deposited or drawn out from it; and as a rule one cannot discharge the duties of the other.

The paying teller usually receives a higher salary than any other clerk, because the responsibility put on him to scrutinize signatures and to pay money is peculiar and very great.

To his care is committed the custody and disbursement of the bank's funds. He must know the signatures of the bank's customers, and be ready to decide upon the payment or refusal of all checks when presented. His position is very responsible.

The refusal of payment, of a genuine check, or the payment of a forged check, in either case may be a serious matter. A great variety of checks are, during a day's business, drawn and presented for payment, and each one requires more or less examination. Many of them are required to be endorsed, and before passing his hands he must see that the proper endorsement is made. Frequently checks are post-dated, and may be presented for payment before the time fixed by the drawers. Sometimes the dates are altered, and the teller must satisfy himself whether the alteration is material or not.

In the payment of checks, the teller must think of and decide many important things: First, is the signature genuine? Second, is the account of the drawer good? And third, is the person holding and presenting the check entitled to receive the money? Fourth, is the check raised or altered?

"A teller," says an eminent jurist, "is an agent acting under a special or express authority, and not one so appointed by a principal that there can arise any implication of defined power. By the nature of the teller's employment, his duties are defined with an approach to exactness. Such a one is

sometimes called a special agent, though the phrase is open to objection. The principal holds out to the public as an agent with limited powers, and with such a one third persons deal *periculo*."

A teller, known to be such by one doing business with him, cannot bind the bank by an agreement to pay interest to a depositor in excess of the rate which the bank through its board of directors have authorized, and especially so where the rate of interest agreed to be paid was entered as a stipulation in the passbook.

The teller has no authority to make contracts for the bank, and when he attempts to do so, if the party dealing with him has the knowledge of the fact that his position in the bank is that of a teller, the bank is not bound by the contract where the same is outside of his duty and authority to act. The rule, however, is different where persons dealing with him and in good faith, without notice of any want of authority in such officer, and the act done is in the apparent scope of his authority, whether clothed with such authority or not, the party so dealing with him would be protected.

The acts of a teller, if not within his authority, may be ratified like those of other officers. The powers of a teller to act in the absence of the cashier is one of considerable importance. In Potter v. Merchants Bank, 28 N. Y. 641, p. 650, Justice Mullin says: "The cashier cannot clothe him with any more of his power than was necessary to enable the latter to carry on the usual and ordinary business of the bank." In that case the teller "in the absence of the cashier had authority undoubtedly to receive payments of notes and surrender them to the person entitled, and, in a word, to do whatever was necessary and proper to be done in the ordinary course of business." "I do not doubt," the court continued, "but that the teller had power to transmit notes owned by the bank or held by it for collection and payable in other places, or at other banks, to its agent for that purpose, and as, in order to do so it becomes necessary to endorse the paper of the bank, he had power to make such endorsement. But he had no power to pledge its securities unless they became pledged by the mere act of transmitting for collection."

The paying teller's duties necessarily bring him in contact

with the active customers of the bank, and although his bookkeeping is simple, no item which requires entry for his settling book can be omitted.

The paying teller's duties principally are, as has been stated, the payment of checks presented by customers of the bank. These checks are usually on the bank over which he presides as paying teller. These checks, when paid, pass out of his hands to another clerk, to be charged to the account of the dealer. He also cashes checks for the customers of the bank which are drawn upon other banks. These are then sent to another department to be collected. After checks have passed from the hands of the paying teller to other departments to which they belong, any attempt to get them back by the teller paying them is regarded with suspicion.

It is also the duty of the paying teller, when authorized, to certify checks, unless such authority is strictly delegated to the cashier. In certifying a check, when it is a part of the teller's duty, he should be provided with a book of blank forms with two stubs, both being numbered, which are used in his reports to be made to the general bookkeeper. The certfication of a check is usually done by using the stamp of the bank, which saves time, the teller signing his name and date of certification. It is then handed back to the holder. The bank then has obligated itself to pay the check; whether the drawer or holder has the money to his credit in the bank makes no difference. Certified checks should not be issued, however, unless the customer has the amount for which they are drawn to his credit. No officer of the bank has the authority to certify credit to any one unless authorized by the board of directors. Certified checks covering an amount in excess of the deposit on credit in the bank to the drawer of the check is permitting an overdraft, and overdrafts, being granted and allowed without security, in case of loss the officer allowing the same becomes personally responsible.

A paying teller's position in a large bank is a very important and responsible one.

The bank may have any number of tellers; the volume of business may be so great that many persons are required to perform this duty.

The first paying teller is considered in rank for promotion

next to the assistant cashier; and receives from him or the cashier instructions which he should, if not inconsistent with special orders or directions from the board of directors, follow and comply with. At the beginning of business in the morning he receives from the cashier a certain amount of cash, which he is charged with and must account for at the end of the day's business; deducting therefrom all checks or other payments made by him. The daily routine and duty of the teller begins a short time before the bank's doors are open for business. He should appear at the bank sufficiently early to arrange for the duties of the day. Having received from the cashier the cash his responsibility of paying checks begins. His duty in this particular department is to pay only such checks as are properly drawn, dated, and signed. If he honors a worthless or forged check, the bank must bear the loss, unless by reasonable care and ordinary precaution it could have been discovered and the loss averted, and in such a case failing to use such care he may make himself personally responsible.

A paying teller may safely guard and prevent all liability by adhering to the well known principles and rules relating to and governing the payment of checks.

He is supposed to know all the customers of the bank, at least should be familitr with their signatures; not having such knowledge and a check is presented for payment it becomes his duty to satisfy himself as to the genuineness of the signature, and if, being in doubt as to the sufficiency of funds to pay the same, he should pass it to the ledger clerk, who will inform him of the status of the customer's account. Having satisfied himself fully upon all these points he can safely pay the same; failing to perform this ordinary duty and care, if loss occurs to the bank the teller may be held personally responsible as it is his duty to use reasonable care.

The paying teller cannot be held personally responsible for losses occurring when he uses such care as one in his position is expected to use and does use. He cannot be held for paying a raised check which by ordinary care, careful scrutiny, and inspecion could not be discovered; but if there are any indications which might be discovered on the face of the check by an ordinary person that it has been raised, or that the

check is not genuine, or lacks any of the legal requirements to make it good; for example, if it is not dated, or is a post-dated check, or is not properly indorsed when an indorsement is required, or the amount of the check is not legibly written, or lacks the proper signature to charge the drawer's account: he may be held personally responsible to the bank; but he may pay a counterfeit or forged check or a raised draft and, where he uses reasonable skill and such ordinary care and precaution as may be expected and required of a person occupying the position, he cannot be held liable.

It is also the duty of the paying teller, after the exchanges have been made at the clearing house, to examine carefully each check coming through the same before charging the same to the drawers account. If any are found to be irregular, or forged, it becomes his duty to immediately notify the manager of the clearing house and give notice also to the bank from which they were received; failing to perform this duty in due time the bank may be held responsible for any loss which may occur.

It also becomes his duty, in the absence of the cashier and when authorized so to do, to certify checks when required and presented for that purpose. Before binding the bank by such certification it becomes his duty to examine the account of the drawer, and ascertain that he has sufficient funds deposited with the bank to pay the same. Having ascertained this fact, and being clothed with the power, he will not hesitate to place the certificate on the check. This is ordinarily done, as previously explained, by writing or stamping upon the face of the check the words "certified good" or the word "good." The certification should be dated and then signed by him in his official capacity. Having certified the check, he then by a memorandum check charges the same to the customer's account; and the amount is charged against the bank and placed to an account called "certified check account." The bank then becomes a debtor and must pay the same to any lawful holder who may afterward present the same.

In certifying a check it is held that he has no inherent or implied authority to do so, and cannot perform this act unless authorized, and unless the drawer has the money to his credit in the bank at the time of certification. If he allows an over-

draft by paying or certifying a check, having no special directions or authority to do so, he makes himself personally liable.

He has no authority or latitude upon this subject; his duty is plain to pay checks only when properly drawn and the drawer has the money in bank to meet the same. Latitude is often taken and responsibility assumed, but unless he has been directed or authorized by proper and superior authority he has no right to grant a credit by paying checks or certification thereof when the maker has no money on deposit to meet them.

The overpayment of a check creates an overdraft which, though authorized and permitted in many State banks, is allowing credit to persons without an expressed promise to pay, and such overdrafts thereby become doubtful loans; and the bank has no authority to advance money upon a verbal promise to repay the same; and an officer is restricted in his authority to make loans upon a written agreement to repay unless duly authorized by the board of directors.

Where a teller certifies a check or gives credit to a customer by permitting him to overdraw his account; and such latitude has been frequently practiced and sanctioned by the board of directors, this degree of latitude may release him from personal liability.

He may also be released from liability by the ratification of his acts by the board of directors; but the rule is that he has no inherent authority to bind the bank by any act outside of his defined duty or authority granted to him, and failing to secure such authority his acts are unlawful.

In the payment of indorsed checks care should be used, and before payment the teller should require the holder and indorser if not personally known to him to identify himself. This is done by the holder of the check calling into the bank some person personally known to the teller, who is required to identify the indorser as the person entitled to payment. This may be a verbal identification or it may be an indorsement of the check by the person himself. Such an indorsement may be a restrictive one, not a guaranty of payment but one of identification only.

If a check indorsed comes to the bank through the clearing house, the bank receiving payment of the same is held liable upon its indorsement.

The teller should also before honoring a check satisfy himself that there is no revocation not to pay, previously entered with the bank by the maker. The bank should always require that the notice of revocation should be in writing, signed by the maker. While a verbal notice may be held to be good, the authority may be questioned and in such a case it must be proven that notice was duly given. A verbal notice frequently causes litigation; and the rule should be that all such notices, to be binding upon the parties, should be reduced to writing and signed by the party revoking the payment of the check.

A teller paying a check where notice is on file not to pay the same, will be held personally responsible (if liable at all) to the maker for such negligence; as it is his duty to ascertain whether any such notice of revocation has been filed, but if no notice has been filed with the bank, a verbal notice to some officer of the bank which has not been conveyed to the teller cannot bind him.

At the close of the day's business it is the duty of the teller to make "proof" of the day's transactions; his cash on hand, adding all checks paid, must agree with the cash received from the cashier at the beginning of business of that day.

Having discussed in a general way the qualifications and office of the paying teller his duties as defined by law are presented.

§ 148. Teller's duties.

It may be said that the courts generally have denied that the teller by virtue of his office has any inherent power. They lay down the rule to be that through a course of dealing, and by usage and custom, he may have (without being specially delegated to perform certain duties) the implied power to represent, and thereby bind the bank.

If it is the usage of the bank to recognize the acts of the teller of the bank is held liable.

The teller by prior course of dealing may have implied power to bind the bank by certifying a check.[1]

Where the teller is authorized by the bank to certify checks it is bound by his certification, and his authority may be shown

[1] Security Bank v. The National Bank of the Republic, 23 Am. Rep. 129; Farmer's Bank v. Butcher's Bank, 69 Am. Dec. 678; Meads v. The Merchant's Bank of Albany, 25 N. Y. 143.

by proof of his custom to do so which has been recognized by the bank.[2]

The duties of a teller, however, are usually those which are delegated to him either directly by the board of directors or by the president or cashier of the bank.

If his duties are specifically defined by the board of directors, the cashier has no authority to interfere with the instructions. Usually, however, he receives his instructions and authority from the cashier. His office is to aid the cashier and perform such clerical duties as may be required of him. Therefore the teller is the cashier's subordinate. He is detailed to perform a certain duty.

As his office signifies, being designated "Paying Teller," his duty is to pay out money for the bank, and if specially delegated by the board of directors to perform this service and this alone, he has no authority to receive on deposit money for the bank, or certify checks; however, in the absence of such authority if he does so in violation of the order of the board of directors, and those dealing with him have no reason to question his authority, the bank will be held liable; but it is seldom that the board in the employment of a teller specifically defines and limits his power to that alone of paying out money for the bank. The fact that the paying teller is employed by the board of directors for that purpose, does not estop the cashier from paying. He has the inherent power to perform this function, and is therefore a co-ordinate agent with the teller of the bank.

It is possible for the board of directors to take away from the cashier an inherent power. It could withdraw from him the power to pay out the funds of the bank, and delegate the power alone to the paying teller; but such a rule would destroy the usefulness of the office of cashier; and such an order, therefore, would greatly retard and injure the business of the bank.

The teller independent of direct instructions as to his duty, as stated, is under the direction of the cashier, and while acting under such direction his acts become the acts of the cashier.

There is a very interesting discussion of the question as to

2 Hill *v.* Trust Company, 57 Am. Rep. 189, 108 Pa. St. 1.

the power of the paying teller to receive deposits where his duty alone is to pay deposits. It is held that if he attempts to act in the capacity of receiving teller, he becomes the agent of the depositor to turn over the money to the receiving teller.

In the case of Thatcher v. The Bank of the State of New York, 5 Sandf. 121, the court says: "A person may, no doubt, become a dealer, by a deposit made on the day his draft or note falls due, though never before in the bank, but his deposit must be made with the proper officer of the institution and with the requisite assent to his becoming such dealer.

"In this instance there is, in the first place, no pretence that the cashier, or any officer of the bank except the paying teller, ever assented in any manner to the plaintiff's making a deposit, or becoming a dealer with the bank. The first step toward establishing a duty of the bank toward the plaintiff is therefore wanting.

"Let us suppose this difficulty obviated, the next step is to show a deposit properly made, that is, that the money was left with an agent of the bank authorized to receive it. The person who left the money knew that the agent who received it was the paying teller, and not the receiving teller of the bank, and it cannot be said he was ignorant of the fact that there were two such officers. Indeed, there was no such idea advanced at the trial. Now the very names of these two agents indicate to every one the proper and widely different functions of each. The one is to pay out the money of the bank; the other is to receive moneys for the bank. Dealers always pay their money to the receiving teller. When they draw money from the bank or their notes or bills are presented made payable at the bank, the paying teller pays the amount to them, or to the holders of such notes or bills.

"But we are not left to the inference derived from the names of these agents. The answer states that the proper receiving officer of the bank is the receiving teller, and that it was not within the duties of the paying teller to receive the money left in this instance, or to assume to pay the plaintiff's bill with it, and that it is not in the usual course of business to deposit moneys with the paying teller. The reply does not traverse the allegation as to the receiving teller being the proper receiving officer of the bank, but it alleges that the

receiving of money by the paying teller, in the bank, during bank hours, is within the ordinary scope of the business of the paying teller and of the bank, and that his receipt and promise in the instance before us were within his duties and bound the bank.

"The proof entirely failed to make out these allegations. It was shown that in several instances these same parties had left funds with the paying teller in the same way that these were left, but there was no proof that it was his proper function to receive them, or that it was in the usual course of business for him to receive funds in behalf of the bank. On the contrary, both the cashier and paying teller clearly prove that it is no part of his duty or business to receive moneys for the bank; and the teller testifies that when he does receive money for parties who do not keep an account in the bank, in order to pay notes they have drawn payable there, it is as a favor to such parties; he sometimes refuses, sometimes when pressed very hard he takes it for them, and he then keeps it separate from the money of the bank.

"It is true the cashier appears to have known in a few instances that the paying teller thus received money to pay notes and bills, and did not forbid it; but we cannot infer from this an assent of the bank that he should, in their behalf, receive money for that purpose. His duties as their agent were clearly defined, and the cashier's knowledge that he occasionally while in the bank acted for others does not show that the bank adopted those acts.

"So far from the proof showing that, in this transaction, the paying teller was the agent of the bank, it clearly shows that he was the agent of the party who left the money. The bank had nothing to do with the affair, nor was it intended that it should have."

The view of the court in the above case is that the teller's office is a very narrow one; and where his duties are confined to that of paying out money he cannot perform any other service for the bank, such as receiving a deposit. If he does so he becomes the agent of the depositor.

This Rule may hold good, where it is clearly shown that the person dealing with him had the knowledge that his duties were limited to the payment of money for the bank, and that only.

In the absence of the cashier the paying teller does not succeed to his powers. It would be necessary, therefore, in the absence of the cashier for the board of directors to delegate to him such powers as they might wish him to perform.

The cashier may direct him, the teller, to perform certain duties, but he cannot absent himself from the bank and its responsibility and delegate his authority to the teller.

The cashier may delegate to him authority to make remittances for the bank and to pay its lawful debts; but he cannot authorize him to perform acts which are clearly and exclusively those inherent in his office.

The cashier of a bank has the power to transmit a promissory note to another bank for discount and collection, and to transfer the title thereto to the latter bank; but a mere clerk, acting as cashier in the absence of that officer, has no authority to transfer any of the notes or securities of the bank, unless such authority has been given to him by the directors.

It is held, however, that the cashier may clothe such a clerk with ordinary power necessary to enable the latter to carry on the usual and ordinary business of the bank.[3]

§ 149. Teller's torts.

A teller cannot bind the bank by unlawful and unauthorized acts; and in order to charge the bank with a violation of the law subjecting it to the penalty imposed, it must be shown that the teller acted under authority from the board of directors, or that his act was subsequently made known to and adopted by the board.[4]

In a previous chapter the penalty imposed by section 5209, Revised Statutes of the United States, was discussed as it applied to the officers of a national bank. It was there stated that in order to hold an officer, namely, the president, director, cashier, teller, clerk, or any other agent, of such an association for the violation of any of the provisions of said section of the law, it must be shown that the act was "*willfully*" committed.[5]

[3] Potter *v.* Merchants Bank, 28 N. Y. 641.

[4] Clark *v.* Metropolitan Bank, 3 Duer, 241.

[5] United States *v.* Britton, 107 U. S. 655.

§ 150. Receiving teller.

The receiving teller's position is one of peculiar responsibility, requiring great skill, accuracy, and caution. He is the bank's agent to receive money (of which there are ten different kinds in circulation in the United States) from those wishing to make deposits in the bank. His position places him in close relationship with all customers and persons who may make deposits with the bank. His office, therefore, and the duties arising therefrom, require that it should be filled by a person adapted to the business which necessarily is to be performed.

The bank imposes great confidence in the receiving tellers's judgment and skill to protect it from bogus and spurious checks, bank notes, and coins which may be presented for deposit and credit. If he lacks the judgment and skill required as an expert to detect counterfeit notes, coins, and forged signatures, he is not a suitable person to occupy the position of receiving teller; for through his hands the bank receives its deposits and is held responsible to its customers and depositors to repay to them upon demand lawful money. Therefore, it is his duty when receiving a deposit, before entering the same on the book of the depositor, and giving credit therefor, to make a careful examination of all the money, checks, notes, and bills that are offered for deposit.

It is his duty to protect the bank and not receive or give credit to a depositor for money, checks, or drafts which may be counterfeits or spurious. He should make a careful examination of each coin, bank note, check, draft, or other instrument offered for deposit, and before acceptance, if in doubt as to their genuineness, apply the test known to experts. For example, if coins are presented, which may consist of gold and silver, coined by the mints of the United States, or any other country, he should know their value; and ascertain before accepting the same, that they are genuine, and contain the standard weight fixed by the government coining such money.

The test adopted by the United States mint to detect counterfeit gold and silver is as follows:

Nitrate of silver (crystals)	24 grains.
Pure nitric acid	15 drops.
Distilled water	1 oz.

A drop of this liquid on counterfeit gold or silver, immediately turns black; while if applied on the genuine coin it will remain clear.

If the teller, after applying this test and finding them to be genuine, is in doubt about the coins containing the standard weight, the bank should be equipped with scales sufficiently accurate to test their weight. It frequently happens that coins which are genuine are light and do not contain the standard weight fixed by the Government. If they are found to be below the standard required, the Government will deduct from the value the amount necessary to reinstate the loss.

A gold coin in the ordinary use of the same, say a double eagle, will maintain its standard weight for over fifty years. It may be reduced in weight by being put through various processes, that of "rubbing" or what is called "sweating."

If the teller finds the coins light (perceptibly so), he should deduct the amount from the value of the coin. If the owner objects to this, the coin should be refused. If the bank accepts the coin which it knows to be below the standard weight at a discount found to be correct by weighing the same, it becomes the duty of the bank to transmit the same at once to the Treasury Department at Washington. On receipt of the coin it is tested as to its genuineness and weight, and if found to be below the standard, it is immediately turned into the mint and again recoined.

If the bank accepts coin which it knows to be below the standard of value, in the acceptance of it, having discounted it, and charging the amount of loss to the owner from its standard value, and again puts the same into circulation, passing it as of correct standard weight, and for its face value, it is subject to punishment.

It is the duty of the receiving teller to examine all national bank notes, United States notes, currency certificates, or treasury notes that may be offered for deposit, and before accepting the same satisfy himself as to their genuineness.

To become an expert for this purpose it requires considerable practice and study, and for the benefit of those who occupy the important position of receiving teller, the following instructions and specific tests are given.

The Government of the United States has expended a very

large sum of money for complicated mechanism embracing geometric lathes, hydraulic presses, ruling, and transfer engines, patent paper, secret inks, electrical test, all of which are used in the manufacture and printing of our money; by the use of which the Government of the United States, by authority of law, give us the handsomest paper money in the world: at the same time making it (by the use of such fine and costly complicated mechanism, consisting as stated of such delicate and perfect machinery, etc.) impregnable against the skill of the counterfeiter.

The Tests.

The paper used by the Government for the body of the note is composed of material known only to the Government. This is true also of all its inks and coloring fluids used on the paper.

The body of the paper is manufactured from the finest quality of silk and linen. This is rolled in layers crossing and recrossing each other, which give it great strength and durability. In the body and on the surface of all genuine paper money is the "localized fibre," which is a mixture of jute, a species of sea-weed and clippings of colored silk thread. This fiber may be seen in the paper and can be picked from the surface with a sharp-pointed instrument.

The genuine bank-note paper is a clear milky white.

The counterfeit imitation of the fibre are printed scratches of ink appearing on the surface of the paper, and by the use of a sharp instrument can be easily detected as such. What is known as the localized tint appears in a blue tinted parallel strip crossing the face or back of the genuine note and has not as yet been successfully imitated.

The expert desiring to make himself proficient should take a new bank note and inspect it very carefully. In doing so he will discover that it is manufactured from the most costly quality of silk and linen, which is seldom used in a counterfeit.

The Bank of England, it is claimed by experts, manufactures the best bank-note paper in the world. Its strength is so great that a five-pound note twisted into a rope or cord will sustain a weight of 150 pounds.

The genuine paper through the sense of touch and feeling

after some practice becomes so familiar to experts, that through this test alone counterfeits are easily detected.

The touch test.

This test is one which experts and those experienced and who are accustomed to handling bank notes regard as one of great value.

In using this test, take a genuine bank note, hold it firmly in the hand and draw it carefully, but not too swiftly between your thumb and fingers; do not press it so tightly as to impair the sense of touch, and you will discover that the paper will reveal a rough parchment feel, the interior will be oily, tough, elastic and silky.

The sense of touch is one when practiced becomes very accurate. The genuine bank note possesses through its manufacture and the materials used in its composition a something which you become familiar with. The counterfeit bill, if tested in the same way, reveals to the touch a very different sense of feeling. The counterfeit reveals to the touch a smooth, dry, and glassy surface. The paper seems to be devoid of life, elasticity, and the silky texture felt in the genuine. The counterfeit, as it is drawn through the fingers, slips easily, lacking that clinging feel presented in the genuine. If the counterfeit appears devoid of the glassy surface, the paper will usually be inferior, flimsy, having a spongy, pulpy, and shoddy feel. The paper lacks the strength of the genuine, being rotten and easily torn.

Experts by the use of this touch test have become so proficient that they will, when blindfolded, detect the counterfeit from the genuine bank note.

Geometric lath-work test.

The endless, white, curving lath lines in the test dyes of all genuine Government or national bank notes are very accurate, fine, and more delicate than a hair. They are sharp and smooth on the edges (but do not present sharp angles), and are invariably the same size. These delicate, perfect, and beautiful lines are cut with the point of a diamond. The texture of this work varies quite materially. In some dyes the net work is shown being twined together, while in others the work is woven and interwoven until almost as fine and

close as cloth; all lines, however, cross each other at regular intervals, the curves are perfectly symmetrical and appear as if struck with the point of a compass. No defects can be seen in the lines, no breaks appear, while in the counterfeit lath work, which is engraved usually by hand or imperfect machinery, the lines are not continuous, breaks are frequently discovered, and by close observation it will be seen that the lines at the edge present sharp angles resembling fine saw teeth. They lack the graceful curves and perfect geommetrical symmetry of the genuine.

The lines also in the counterfeit are not equidistant, they are also heavier in some places than others, neither are they entirely straight.

The genuine vignettes.

The genuine vignettes appearing on the government notes and bonds are exquisitely finished. The engraving is very expensive. An eminent artist who excels in this line, it is said, has received for a single head furnished the government the sum of six hundred and fifty thousand dollars ($650,000).

These pictures are lifelike. They are as perfect as skill and talent can make. In observing the eyes you can perceive that they are expressive, clear and sharp, showing the white very distinct.

The lips are shown to be slightly pouting and display delicacy. The hands and feet being perfectly formed; observing the forehead, the pores of the skin or flesh tints are exposed. The face, limbs and neck and other portions of the body are represented by delicate dashes and dots set in perfect semicircular rows. On the shaded side will be seen the beautiful fine black lines crossing and recrossing each other at accurate angles presenting a clear sharp diamond work, producing a symmetrical beauty and relief appearance to the picture.

The background of the picture, which has gradually vanished and which surrounds it, is formed of delicate and perfect squares. The drapery of the picture is exceedingly graceful, flowing, and natural. The hair is artistically arranged, it is devoid of courseness, it appears soft and natural. The shades and lights are so nearly perfect that the strands

of the hair can be distinctly seen. The whole picture shows exceedingly great skill, all the work being wrought out and blending together to a perfect degree of harmony and perfection.

The counterfeit vignettes present a lifeless appearance. The countenance appears haggard, the eyes are blurred, dull and foggy. There is distinct demarkation of the black and white of the eye. The black of the eye mingles with the white. The features are flat and expressionless. The mouth lacks the rounded pouting lips. The flesh tints, showing so perfectly upon the genuine on face, neck, and limbs, upon the counterfeit show course dots. The diamond and background of the counterfeit work is blurred. The hair fails to show the distinct strands, and appears coarse and altogether unnatural.

The genuine inks.

There are five kinds of inks used in numbering the genuine notes, three of red and two of blue. There are also two shades of red appearing in the seals.

The number at the top of the national bank note is the serial number. The number at the bottom of the note is the serial number of issue by the bank. The number at the top is a very rich, bright carmine with clear cut edges. The number at the bottom of a note is several shades darker. The number at the top and bottom of the government notes appear in the same color and are several shades darker than those on the national bank note; but they appear with the same lustrous surface and sharp cut edges. The seal on the national bank note is darker than that on the government note; it is a bright carmine with a pinkish tint.

The inks used are manufactured by secret process, the chemicals used are unknown to counterfeiters; and it is said that in no instance have they been successfully counterfeited, or even imitated. The red ink number may be obscured by soiling but by touching it with a damp sponge its color will be brought out perfectly, while in the counterfeit the red ink used in the number and seal presents a pale red or dark log wood. It lacks the lustre, the edges appear ragged, while the dampening with the sponge more clearly reveals its spuriousness.

The genuine green ink used has a very rich grass-green hue. The color of this ink is very strong and will be retained until the note is almost worn out. It will be noticed that the only distinction between the national bank note and the government note is in the shading. The government note appears several shades darker than the national. This ink is also made by a secret chemical process known only to the government. The counterfeit green ink upon close investigation appears in a variety of shades, dark green, pale, or pea green, and lacks the lustrous green of the genuine. It is dull and dead in its appearance.

The genuine black ink used is almost a pure carbon and will retain its jet black and glossy appearance a great length of time, even on old and worn notes. It appears remarkably fine.

The counterfeit black ink lacks the gloss. It has a brownish, smokey appearance and is devoid of the lustre appearing in the genuine.

The chemical bath which the bank and government note paper receives prepares it for receiving the ink impressions and prevents the ink from spreading, which is frequently noticed on the counterfeit.

The plate used in making these impressions is a work of art and very accurately cut. It is very difficult for the counterfeiter to produce a plate that even resembles the genuine.

To detect altered bank notes it is necessary to become familiar with the genuine engraving. Upon close observation a striking contrast will be observed between the genuine portion of the note and that of the counterfeit substituted.

In the altered bank note the corners are generally extracted and the counterfeit printed into their places. To execute this work it becomes very difficult. The extracted part of the note must leave the paper more or less damaged; and the printing taking the place of the original and generally the miserable execution of the work can be perceived at a glance. In substituting the letters and figures it is almost impossible to retain the natural and genuine colors; and it will be observed that the substitution presents course outlines and is otherwise imperfect.

Spurious signatures.

The signatures upon all government notes are engraved, while those upon national bank notes, under section 5182, R. S. U. S., are required to be signed. But under the ruling it is held they may be stamped upon the notes.

The same rule applies in detecting the engraved signature and determining its genuineness as given to detect other portions of a note which is engraved. The counterfeit will lack the symmetry and perfect shading and natural appearance.

The signatures appearing on the national bank notes, as stated, should be signed. They are those of the president or vice-president and the cashier of the bank.

It is very difficult to determine the genuineness of the written signature unless you have the standard or genuine before you; and have familiarized yourself with the characteristics of the writer. Having become thoroughly familiar with the genuine signature of the writer, it does not become impossible to detect a counterfeit; but it is impossible that a banker or teller should have the opportunity to know the signatures of the signing officers to the national bank notes, and therefore it is seldom that a counterfeit national bank note is discovered through this source.

There is no known rule to be guided by in the detection of a counterfeit signature. It has been demonstrated beyond question that the most scientific and greatest experts have been deceived at their own trade.

Of course the forgery of a signature may be and frequently is discovered, but this is usually done where the work is rough and unskillfully performed. No person ever wrote his signature exactly alike the second time. It is a thing impossible to do.

Expert knowledge is very useful, especially in discovering forgeries of instruments such as wills. Where the forger undertakes to imitate the handwriting of a person (other than his signature) it becomes very difficult, and the forgery may be comparatively easy to detect; but it is very difficult to detect a forged signature where skillfully executed, therefore the courts hold that the bank can only be held responsible for such reasonable care, prudence, and skill as may be required and is expected of a paying teller.

The receiving teller may not have the time to apply all these various tests; but if when receiving a deposit he has any doubt as to the genuineness of a note or coin it is his duty to call the attention of the depositor to the fact, and if upon examination it is discovered that the coin or bill is a counterfeit, it then becomes the duty of the officer or receiving teller to immediately take possession of such counterfeit coin or note, and if a note to stamp in plain letters upon the face of the same the word "counterfeit."

Section 5 of the act of Congress approved June 30, 1876, provides "that all United States officers charged with the receipt or disbursements of public moneys, and all officers of national banks, shall stamp or write in plain letters the word "counterfeit," "altered," or "worthless," upon all fraudulent notes issued in the form of, and intended to circulate as money which shall be presented at their places of business; and if such officers shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face value thereof."

There are no provisions of law enacted by any State directing that officers of State banks shall mark such notes as are found to be counterfeit; but it would clearly be the duty of such officer to do so.

Counterfeit notes or coins when detected should be remitted to the treasury department at Washington. After receipt of same at such office, and upon examination, if they are found to be counterfeits, they are returned to the sender (canceled) for the purpose of enabling him to make reclamation; and after such use they must be finally returned to the Treasury Department and by it transferred to the secret service division thereof.

The teller must also satisfy himself that all checks presented by the depositor are regular.

As stated in a previous chapter the check must be dated, must be drawn on a bank, it must call for a certain sum of money, payable either to bearer or to order of a person named, and be signed by the maker. Being satisfied that the check is regular he should require the depositor to indorse the same, for by such indorsement the bank is in possession of positive

evidence of the source of its receipt; and the last endorser may also be held liable to the bank.

If the teller receives certified checks, being checks certified by another bank, the indorsement of the depositor becomes necessary to pass the title of the check and establish the fact that he is the *bona fide* holder.

§ 151. Limitation of power.

The receiving teller has no authority to make discounts, certify checks, or allow a credit to a depositor. His duty is confined to receiving money, and only such documents as pass for cash. He should not open an account with a stranger until he has been instructed or authorized to do so. This authority is left with the president or cashier, who may alone determine who the customers of the bank shall be.

§ 152. Rule as between depositor and bank correcting errors.

The receiving teller in receiving a deposit may fail to give the depositor the proper credit on his pass book. Errors are likely to occur in this way. The depositor failing to list the items of deposit on the deposit slip, which may consist of coin, notes, checks, etc., the teller should return the deposit slip to him and request him to enter each item on the deposit slip. Failing to do this the teller's entry of the amount of the deposit in the absence of the depositor is subject to correction. If the depositor can show that an error has been made, and he has not received a proper credit, the bank will be held liable. But it may be very difficult for him to show this. If he has entrusted the money, checks, and drafts, together with his pass-book, with the teller and leaves the bank before the entry is made, the teller may become both his agent and the agent of the bank for the purpose of making the deposit.

The teller may require the depositor to remain and verify the amount to be entered to his credit in his pass book. But where the depositor says, "I am in a hurry, I cannot remain," and the teller enters the deposit, the bank may be held for an error if any should occur. The teller is not required to take the responsibility of listing the items for the party upon the deposit slip, and may refuse to give credit to the depositor

unless the items have been listed upon the deposit slip by the depositor himself.

The bank may make any reasonable rule governing the receiving of deposits, and if known to the depositor, and he fails to comply with it, the bank cannot be called upon to correct an error which was the direct default of the depositor.

Where the rule requires the depositor to verify the correctness of the deposit in the presence of the teller, and failing to do so he entrusts the counting of the deposit, and the entry thereof in the pass book to the teller, the bank cannot be held liable. The depositor has made the teller his agent to count the money and make the entry. The teller, however, may be held liable to the depositor as an agent in case of loss or false entry.

It is well understood that the bank cannot make a by-law, or establish a usage, which would injure or deprive third parties of their rights.

A by-law which may operate by construction of the law to relieve the bank of a reasonable duty or responsibility, which is imposed upon it by the very nature of its business to perform, is void. But a bank is entitled to protection from suspecting and designing persons, and it may enact a by-law which is reasonable, requiring the depositor to be present and verify the correctness of the amount of the deposit, before it is passed to the credit of the depositor.

If a customer of a bank cannot be held to reasonable care and diligence in respect to his own business, he should not ask the bank to be held to correct an error for which he alone is responsible.

A depositor cannot walk into a bank and hand to the teller his deposit book with money and checks for deposit, and leave the same with the teller before the amount of the deposit is verified, and the entry is made, and afterward charge that the teller was in error, and upon his testimony alone hold the bank liable.

The duties in general of the receiving teller may be defined and prescribed by the board of directors, or by the by-laws of the bank. In the absence of such directions or by-laws he is the subordinate of the cashier and is subject to his direction and orders.

If his duties are definitely prescribed by the board of directors, he is held accountable only to them for a failure in the performance of the same.

If he is the subordinate of the cashier and follows his orders and directions he cannot be held personally liable for loss or injury to the bank.

Where a teller is selected and retained by the bank, to perform the duties of receiving teller, the cashier may also receive moneys for deposit, for his duties are co-ordinate with the teller in this particular.

§ 153. An act prescribing punishment for mutilating, uttering, or passing United States coins.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fifty-four hundred and fifty-nine of the Revised Statutes of the United States be amended so as to read as follows:

"SEC. 5459. Every person who fraudulently, by any art, way, or means, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens or causes or procures to be fraudulently defaced, mutilated, impaired, diminished, falsified, scaled, or lightened, or willingly aids or assists in fraudulently defacing, mutilating, impairing, diminishing, falsifying, scaling, or lightening the gold or silver coins which have been or which may hereafter be, coined at the mints of the United States, or any foreign gold or silver coins which are by law made current or are in actual use or circulation as money within the United States, or who passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or bring into the United States from any foreign place knowing the same to be defaced, mutilated, impaired, diminished, falsified, scaled, or lightened, with intent to defraud any person whatsoever, or has in his possession any such defaced, mutilated, impaired, diminished, falsified, scaled, or lightened coin, knowing the same to be defaced, mutilated, impaired, diminished, falsified, scaled, or lightened, with intent to defraud any person whatsoever, shall be imprisoned not more than five years and fined not more than two thousand dollars."

CHAPTER XII.

THE NOTE TELLER.

§ 154. His duties.

The note teller's duties are to receive the money for all promissory notes liquidated at the bank.

There are two kinds of notes. The notes which are discounted by the bank are called "bills discounted"; those left for collection are "collection notes."

All the notes falling due are placed in the hands of the teller on the day of their maturity. The discounts are received from the discount clerk; the total amount is usually marked on a slip of paper strapped around the notes. When the collection is made the amount is credited to "bills discounted" in the general ledger.

All other notes, falling due and belonging to the bank on the day of maturity, are placed in the hands of the note teller by the collection clerk; the amount of each note is either marked in pencil on the note or is shown by a ticket accompanying the note. After the notes are placed in his hands, he is authorized to receive payment. All notes received by him which are payable at other places in the city are sent out by messenger for presentation and collection. When notes are paid, certified checks or money should be demanded. The teller should be careful to preserve all memoranda of his transactions, in the order of their occurrence, until his cash is proved at the close of business for the day. At the close of business he erases from the cash-book and discount tickler such notes remaining unpaid, and when not otherwise instructed and when protest is necessary, places them in the hands of a notary public for that purpose. He should demand of the notary a receipt for such notes as are placed in his hands. When a note is forwarded to a foreign place for collection, the items or notes are duly entered in a letter form which shows each item or transaction; from this letter the items and totals can be taken and posted in the note teller's cash-book.

The letter under this system is the original entry and a copy thereof should be taken and preserved.

At the close of each day's business the teller must account for the disposition of all notes received by him. His tag or memorandum charging himself with notes uncollected and which are not in his hands should not be accepted. He should present receipts or acknowledgments for all notes and collections when called upon to do so.

CHAPTER XIII.

BANK POWERS DEFINED.

§ 155. Statutory and expressed powers.

The powers given to banks are those derived from their charters and the law creating them, and the statute of the State under which they operate. The statutory powers are called the express powers.

The expressed powers of national banks are the laws enacted by Congress, creating the right of a banking corporation to organize and to conduct the business of banking and prescribing their duties and powers. The express powers are those which directly authorize certain things appertaining to banking, and which guarantee the right of the bank to put them into use and force.

In law, an express or statutory power is one defined and authorized by the legislative body of the State, granting authority to do and perform certain things; and when authorized by law to do and perform an act under such expressed or statutory provisions, the right to do the same can only be inquired into by the State.

A law may be unconstitutional, but the right to put it into force until it is adjudged so by a court of competent jurisdiction, cannot be questioned.

The expressed powers enumerated in the statute, authorizing a bank, when duly incorporated, to do and perform certain things, are privileges created by law. The extent and use of these powers may present questions requiring adjudication by the courts, but banking corporations may use all the powers granted to them by the statute, and if their acts, when performed, are within the law, being lawful, they cannot afterward be declared unlawful.

The statute may grant a specific power to a bank, and prohibit another privilege, which is not unlawful in itself, but dangerous if allowed to be performed by a bank. This is termed a police power or regulation.

A statute may specify the principal things which a bank may do, and prohibit it from doing certain other things which it might lawfully do if they were not prohibited. But the Legislature seldom undertakes to define all the powers expressed, implied, or incidental, belonging to the banking business, but usually contents itself by specifying the principal privileges or powers which it may exercise.

The implied or incidental powers are those not enumerated by the Legislature, but are such as pertain to, and are conferred upon banking corporations by accepted and long-continued use and custom.

The courts recognize these incidental privileges and inherent powers as necessary incidents in carrying on and conducting the business of banking. While customs and uses do not, in every instance, signify that they are fixed privileges or laws, a well-established custom, if reasonable and just, by decisions of the courts, may pass into a fixed rule of law and become a recognized principle and privilege.

The decisions of the courts generally go to the extent in defining incidental or implied powers; "and say that *a bank may make any contract, or establish any reasonable custom affecting or appertaining to the business of banking, and can exercise the powers expressly enumerated in the statute, and also such powers which are properly incidental to the business of banking in conducting its affairs.*"

In the case of Logan County National Bank v. Townsend, the Supreme Court of the United States fully established this principle:

The court, in discussing the question, says: "It is undoubtedly true, as contended by the defendant, that the National Banking Act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, *or such incidental powers as are necessary to carry on the business of banking for which it was established.*"

A banking corporation has all the powers expressed and implied though not enumerated in its charter, which are lawful and authorized in the formation of such a corporation, whether organized under a general or special law. It has also

all incidental, ancillary, or implied power necessary to carry on the business of banking. It has power by reason of the very nature of its purposes and business to do many things not specifically delegated to it by the statute.

The statute may provide that it has power to receive deposits general, special, and specific, and to loan money, to buy and sell exchange, coin, and bullion; to purchase notes and bills, and deal in checks; to make discounts of negotiable paper; to issue and give certificates of deposit, but all of these things by right belong to the business of banking in the absence of and without specific power, delegated and prescribed by the statute, and unless prohibited by law, these powers belonging to a bank incidentally and in the very nature of its purposes and business.

The statute may provide that its business shall be restricted and controlled, for example, if a savings bank, that it shall not invest the money of its depositors in mining stocks, but it has all lawful powers, in the conduct of its affairs necessary to carry on its business which is lawful and permitted to be performed by law; and also all such incidental implied and ancillary powers which such corporations may enjoy in the transaction of their business.

The ancillary powers are those giving to the corporation the right to sue and be sued; to have a corporate seal; to appoint agents and elect officers, and to make by-laws for the management and government of the affairs of the corporation.

In other words, a bank may, unless restricted by the law, perform any lawful act necessary to accomplish the purposes of its creation that an individual could do.

CHAPTER XIV.

CONVERTING STATE INTO NATIONAL BANKS.

§ 156. Steps to be taken.

The National Banking Act, section 5754, Revised Statutes of the United States, provides that "a State bank may be converted into a national bank."

This may be done without reorganization, and no authority is required from the State in which the bank is situated.

In the case of Casey v. Galli, 94 U. S. 673, the court in disposing of the second plea filed by the defendant, which alleges "that there was not then, nor when the plaintiff was appointed such supposed receiver of said New Orleans Banking Association, nor before, nor since that time, any such corporation in existence, because the bank of New Orleans had no power by its charter, nor authority otherwise from the State of Louisiana, to change its organization to that of a national banking association under the laws of the United States," says:

"The second plea is clearly bad. No authority from the State was necessary to enable the bank to so change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. The power there conferred was ample and its validity cannot be doubted. The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally."

In converting a State into a national bank the statute must be strictly complied with.

Section 5154, Revised Statutes of the United States, provides as follows:

"Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking

institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change or convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of said laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this title. When the Comptroller of the Currency has given to such association a certificate under his hand and official seal, that the provisions of this title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this title."

§ 157. Incorporated banks can only be converted.

The bank to be converted into a national bank must exist as a corporation under State laws. A certificate from the proper authority of the State, certifying that a corporation had authority to act as such in a State would be *prima facie* evidence of the fact that the corporation existed under the State law. It would follow, therefore, that a private bank, although permitted by authority of a State to do a banking business, could not be converted into a national bank.

The first step required in the process of conversion from a State into a national bank is to obtain in writing the consent of at least two-thirds of the stock owned by the shareholders.

(By application to the Comptroller of the Currency a proper blank form, or authority for conversion, can be obtained.)

When the consent of two-thirds of the stockholders is obtained, notice should then be given to the Comptroller of the Currency of the intention to make the conversion, and the title to the bank should be submitted. Upon notice being received by the Comptroller, the proper blanks will be furnished by him, which consist of the organization certificate, which must be certified to by at least two-thirds of the board of directors. This certificate must set forth the fact that the stockholders authorized the conversion of the State bank into a national bank. When so executed it should be certified to before an officer, a clerk of a court of record, or a duly appointed notary public.

In the case of a conversion from a State to a national bank, the directors of the State banking corporation hold their positions as directors in the national banking corporation until the next regular annual election.

§ 158. Corporate relation to old bank after reorganization.

The Supreme Court, in the case of Metropolitan Bank v. Claggertt, 141 U. S. 520, in discussing the relationship between the State bank converted into a national bank, holds that:

" * * * the conversion of the State bank in the State of New York, into a national bank under the act of the Legislature of that State of March 9, 1865 (N. Y. Laws of 1865, chap. 97), did not destroy its identity or its corporate existence, nor discharge it, 'the State bank,' as a national bank from its liability to holders of its outstanding circulation issued in accordance with State laws."

The court in further discussing this subject, says:

"The question we are to consider here is, did the court err in holding that the plaintiff in error was not exonerated from liability either by its becoming a national bank, or by the proceedings for the redemption and retirement of its circulating bills issued whilst a State bank, which proceedings, it was claimed, were in strict observance of every requirement of the New York statute of 1859 in relation thereto, or by the statute of limitations of the State of New York?"

The court decided that the New York statute providing for

a redemption of circulating notes and for releasing the bank, if the notes were not presented in six years, applied alone to banks "closing the business of banking;" that the change or conversion of the Metropolitan Bank into the Metropolitan National Bank did not "close its business of banking," nor destroy its identity or its corporate existence, but simply resulted in a continuation of the same body, with the same officers and stockholders, the same property, assets, and bank business under a changed jurisdiction; that it remained one and the same bank, and went on doing business uninterruptedly; and that, therefore, the statutory proceedings relied upon in the answer could not operate as a bar to the liability of either bank to pay the bills delivered by the Metropolitan Bank in 1861 to plaintiffs intestate.

The conversion is not a termination of the corporate existence of the bank, neither is the change one which will destroy the liabilities of the bank. It is simply a continuation of the same body under a changed jurisdiction. The act of conversion does not destroy the corporate existence of the bank; it is only the business or assets of the bank which are converted into the new jurisdiction, and when its liabilities are all disposed of and paid, the bank is left in possession of its charter, and retains all of its corporate rights. If so, it may again go into business as a banking corporation.

This position is fully sustained by the Supreme Court in the case of Michigan Insurance Bank v. Eldred, 143 U. S. 293. It is held in this case that "the State bank, after conversion into a national bank, does not affect its identity, and that it can maintain an action under its charter and in its corporate name, and sue upon liabilities incurred to it." In this case "an action was brought by the Michigan Insurance Bank, a corporation created and organized under the laws of the State of Michigan, against a citizen of Wisconsin, upon a judgment recovered by the plaintiff against him on May 13, 1862, in an inferior court of Michigan, for the sum of $4,211.56; in the present action the writ was dated May 11, 1872, and appeared by the marshal's return thereon to have been served on June 3, 1882. The defendant originally pleaded the statute of limitations of ten years and on that issue obtained a verdict, the judgment on which was reversed by this court at October

term, 1888, because evidence introduced by the plaintiff that within ten years the summons which had been delivered to the marshal for service, had not been properly submitted to the jury. The defendant answering denied, upon information and belief, that at the time of the commencement of the action the said plaintiff was, or is now, a corporation created or organized under the laws of the State of Michigan. In support of the other defense the defendant offered in evidence duly certified copies of the following documents:

First. Articles of association.

" Second. The organization certificate executed at the same date as the articles of association.

" Third. Instruments signed by the stockholders conferring the authority of the change of the State into a national bank.

" Fourth. A certificate of the Comptroller of the Currency that the association had complied with the provisions of law, and was authorized to commence business."

The defense in this case in effect, was that the plaintiff at the time of the commencement of this action was not, or is it now, a corporation. The court, in discussing this question, says:

" The evidence offered by the defendant on this point wholly failed to support this defense, and it must only profit that the plaintiff sued by the wrong name. It showed no more than, that the plaintiff corporation, having been originally created by the laws of Michigan, had, in accordance with the National Banking Act, become a national bank, and its name been changed accordingly, *without affecting its identity or its right to sue upon obligations or liabilities incurred to it by this former name.*

" In the absence of a statutory provision limiting or affecting the corporation rights of a State banking corporation after conversion into a national bank, *the State bank does not lose its charter or right to sue in its original name;* but where, at the time of re-organization the choses in action or property of the State bank have been assigned and transferred to the national bank, the action should properly be brought in the name of the assignee."

In the case of Atlantic National Bank v. Nathaniel Harris, 118 Mass. 147, held:

That "the new bank could maintain an action in its own name against the president for money had and received under the statute of 1870, chap. 217; the fact of sale by the State bank, and purchase of the chose in action by the plaintiff being set forth in the writ."

§ 159. Liabilities of national bank after conversion.

Upon the question as to liability of a national bank formed by the conversion of the State bank, for the debts of the State bank, the case of Metropolitan Bank v. Clagget, 141 U. S. 520, is directly in point. It holds that:

"* * * where a national bank is organized as the successor of a State bank and takes over the assets of the bank and holds the same, it is liable to the depositors of the former bank."

In the case of The City National Bank of Poughkeepsie, Respondent v. William Philps, Appellant, 97 N. Y. 44, the court holds that:

"* * * a State bank transformed into a national bank is but the continuance of the same body under a changed jurisdiction, and between it and those who have contracted with it, it retains its identity and may, as a national bank enforce contracts made with it as a State bank."

Held also that:

"* * * where a State bank, at the time of its change to a national bank held a continuing guarantee of loans made by it to one W., upon the strength of which it had made loans, and after the change further advances were made, an action was maintained by the national bank upon the guarantee and that the guarantor was liable for the loans made both before and after the change."

Where a national bank goes into liquidation, closes its business, and ceases its organization as such in conformity with the act of Congress, in such cases made and provided, and the bank is subsequently legally organized and incorporated according to law, it becomes liable as the successor of all of the property and interests of the former bank to depositors in said bank.[1]

[1] Eans, Administrator, Plaintiff in Error, v. Exchange Bank of Jefferson City, 79 Mo. 182; Bank v. McIntyre, 40 Ohio State 528.

Where a national bank is formed as the successor to a State bank and becomes possessed by assignment of the property of the State bank, owning and holding the assets of parties liable to the State bank before its formation or reorganization into a national bank, the debtors became liable to the national bank, and upon the same theory, if it took the assets of the state bank and can collect and sue upon them, it becomes liable for all the transactions legally entered into by the State bank prior to the assignment or reorganization.

And a national bank in taking over the assets of a State bank, either by conversion or otherwise, *cannot take by transfer or assignment and hold the stock of the State bank. National banking corporations are prohibited by law from holding by purchase directly, stock of another corporation.* A State bank, as formerly stated, does not lose its corporate existence or its charter by conversion into a national bank; it simply transfers or converts its assets into the new corporation formed under the National Banking Law.

A State bank may transfer all of its assets and property of every nature, and its surplus fund, if authorized by all of its stockholders, but it cannot transfer its stock to a national bank. Such an act is an act *ultra vires* on the part of the National Banking Act, and, as previously stated, unless a statute exists which provides that the State bank's charter shall be annulled or be declared forfeited to the State within a certain period after conversion, the corporation (State bank) lives for the full period granted to it by the provisions of its charter and the law.

In the case of Hayden v. Bank of Syracuse *et al.*, 15 N. Y. Supp. 48, it is held that:

"* * * in accordance with the provisions of the statute laws of said State, chapter 97 of the Laws of 1865, the change from a State bank to an association organized under the Banking Laws of Congress, the action on the part of the State bank under said statute operated as a surrender of its charter and its existence as a corporation ceased."

But, as stated, if there are no statutory provisions terminating the existence of the charter, its rights exist for the remainder of the period granted to it by law from the date of the transfer or reorganization.

"The transition of a State into a national bank does not disturb the relation of either the stockholders or officers of the corporation, nor does it enlarge or diminish the assets of the institution. These all remain the same under the national as they were under the State organization. The bank neither loses any of its assets nor escapes any of its liabilities by virtue of the change."

It is not a new creation, but as a national organization, in assuming the place and position of the State bank assumes all of its legal liabilities. It is held that: "Where certain packages of coin were specifically deposited with the State bank prior to the change, that an action in trover would lie against the national bank for conversion." [2]

Where an asset has been assigned, the assignee taking title would be the proper party plaintiff in action, and the corporation bank after assignment, could not claim title or interest in the property, and, therefore, would not be a proper party plaintiff under the statute. But where the old bank corporation has a continuing guarantee of loans, it is held, it retains the right to enforce the guarantee.[3]

Assets which may be transferred by a State bank and converted and held by the new national bank, are limited to such only as the national bank may hold at any time. All assets prohibited to be held by sections 5137 and 5200 of the Revised Statutes of the United States must be retained by the old corporation.

[2] Benjamin Coffy, Respondent *v.* National Bank of the State of Mo., Appellant, 46 Mo. 140.

[3] National Bank *v.* Phelps, 97 N. Y. 44.

CHAPTER XV.

AMENDING BANK CHARTERS.

§ 160. National bank charter, how amended.

The National Banking Act provides the steps to be taken in obtaining a charter, and when all such proceedings are complied with and the Comptroller of the Currency issues a certificate of due incorporation, the charter becomes a contract and is not subject to amendment, only under such laws and restrictions as are imposed by the statute. A national bank may amend its charter, providing "*no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditor of the association shall be impaired.*" The necessity of amending a charter obtained to conduct the business of banking, when obtained under the National Banking Act, could hardly arise. The charter when obtained with power to do a general banking business under said act is complete. An amendment does not enlarge its power by setting out the various statutory enactments, and provisions in the articles of incorporation. All such powers are implied and need not be set out *In haec verba;* but a national bank charter which has been granted, and is defective as to requirements of form and law, may be amended by application to the Comptroller of the Currency.

§ 161. Amending State bank charter.

The laws of the various States by statutory provisions provide for the amendment of the articles of incorporation setting out the mode which must be followed. But the amended articles can, in no instance, extend the life of the corporation beyond the time granted to it by its original articles of incorporation, and the articles of incorporation by amendment cannot create a new power or definite purpose from that intended by the original articles. For example, a bank which is incorporated as a savings bank under a statute authorizing and providing specifically for the incorporation of such banks, and in

conformity with such a specific law, cannot amend its articles of incorporation to include, and give it the power of conducting a commercial banking business.

The Constitutions of the various States generally have a provision that no corporation shall engage in any other business other than that expressly authorized in its charter, or the law under which it may have been incorporated.[1]

The National Banking Act expressly limits the exercise of the powers delegated to national banks, and they can only perform such delegated powers and powers incidental thereto as are necessary in the conduct of their business. The object and purpose in so framing the law was evidently to confine such corporations to a strict legitimate banking business, to make them safe in regard to their circulating notes, and as places of deposit. Public policy, therefore, demands that banking corporations be held strictly within the limits of the law prescribing and authorizing their organization, and the same policy holds good as to State banking corporations.

The Legislature of a State, after a charter has been once obtained by due process of law, has no power to divest the corporation of its rights, or to amend the same, unless such power has been reserved in the Constitution of the State, or unless it has been found that by the operation of such power granted in the charter, the health, peace or public interests generally, are being seriously affected or destroyed by the operation and power of such corporation. It can hardly be assumed that such a condition, or such results could arise from the operation of powers granted to a bank corporation.

The principle is established that a charter when obtained from the Legislature of a State (if not obtained through fraud), or from the general law, becomes one of contract between the parties and cannot be set aside or impaired.

The Constitution of the United States provides that "no State shall * * * pass any * * * law impairing the obligation of contracts."

The celebrated case of Dartmouth College v. Woodward, decided by the Supreme Court of the United States, established

[1] See Constitution of California, art. 12, § 9; Constitution Alabama, art. 13, § 5; Constitution Missouri, art. 12, § 7; Constitution Pennsylvania, art. 16, § 6.

it as the law that when the State granted a charter to a private corporation, it became a contract and could not be set aside unless by the consent of the parties thereto. It has been held, however, that the Legislature has the power to modify at its pleasure, a summary remedy against defaulting stockholders given to a corporation by its charter.[2]

The general rule is: That the courts in construing charters, construe them liberally when attacked collaterally and directly as against the State. A charter of a company formed under the General Corporation Law of a State cannot obtain any privilege in violation of the laws of the State.[3]

Articles of incorporation of State banks may be amended in conformity with the law authorizing such privileges, or power, but the law as stated, must be complied with in all its requirements, as the stockholders' and creditors' rights may be affected, and every step taken must be performed in strict compliance with the statute.

A banking corporation incorporated under the general law of a State to conduct a general commercial banking business, cannot amend its articles giving it power to conduct a savings bank business, or a commercial and savings bank business combined. The law permitting the corporation to amend its articles will not permit it to change its entire purpose. The amendment cannot change the original intention and purpose of the corporation. Its powers may be enlarged and new powers may be added and grafted into the corporation, but such powers must be those appertaining to the original purpose of the corporation; therefore, as stated, a commercial bank incorporated as such, with power to conduct a commercial banking business, cannot amend its articles of incorporation authorizing it to conduct a savings bank business. This privilege is not germane to the original purposes of the corporation; it is a new power attempted to be created; a new right, and not an amendment of the original purpose or intentions or object of the corporation.

A bank may amend its articles of incorporation, but it cannot, by such an amendment, reduce its capital stock to an amount less than its indebtedness. The law permitting a cor-

2 *Ex parte* N. E. and S. W. Ala. Co., 37 Ala. 679.

3 New Orleans National Banking Association *v.* Wiltz, 10 Fed. 330.

poration to amend its articles will not, at the same time, permit it to destroy them to the injury of its stockholders or creditors. The purpose of the corporation cannot be wholly changed. For example, a bank which destroys its original name, and incorporates a new name in place of the old one, and enlarges its capital, enumerating other and different powers from those which it had originally attained by law, is creating a new right and not amending its former rights.

The statute of the State of California, approved March 11, 1903, providing for the amending of articles or certificates of incorporation, provides that "the articles may be amended by majority of vote of its board of directors or trustees, and by vote or written consent of the stockholders representing at least two-thirds of the subscribed capital stock of such corporation." A copy of the said articles of association, or certificate of incorporation as thus amended, duly certified to be correct by the president and secretary of the board of directors, or trustees, of such corporation, must then be filed in the office, or offices, where the original articles are required to be filed. At the time of so filing such amended articles, a corporation is deemed to have the same power as if such amendment had been embraced in the original articles of incorporation. A defect in the original articles of incorporation can be cured by the process of amendment.

Where amendments to charters are provided for by the various statutes of the States, the provisions for amendment must be strictly followed. Cook on Corporations (5th ed.), section 499, declares that "an amendment may be said to be auxiliary and incidental when it merely grants new powers, or authorizes new methods and new plans for the purpose of carrying out the *original plan* and effecting the real object of that plan."

It is also held that "where an amendment changes the corporate plans, the question to be determined is one of law."[4]

[4] Winter *v.* Muscogee R. R., 11 Ga. 438; Southern R. R. *v.* Stevens, 87 Pa. St. 190.

CHAPTER XVI.

BANK REMOVING ITS PLACE OF BUSINESS.

§ 162. National bank removing place of business.

A national bank may, with the consent of the Comptroller of the Currency, remove from one place to another within the State, not more than sixty miles distant from the original place of business designated in its articles of incorporation. The distance cannot exceed the limit of sixty miles, and it must have, before removing, the consent of the Comptroller of the Currency.

The National Banking Act, amended March 14, 1900, provides that "an association may be organized in a town of three thousand population, or less, with a capital stock of twenty-five thousand dollars." Such an institution, authorized to conduct business at the place named, with a population of, not to exceed 3,000 inhabitants, would certainly be prohibited from removing its place of business into a city or town exceeding 3,000 inhabitants, and where a capital stock of a greater sum is required. But where a corporation which has secured rights prior to any such restriction enacted by law, and which it could enforce prior to such enactment, it could not be estopped from changing its location where the statute authorized such a privilege.

A corporation which is required by law to designate a place of business in its articles of incorporation, by such designation thereby gives notice to the world that the place designated is its legal home; "its domicile" is there, and it then becomes legally a citizen of the State.

§ 163. State banks removing place of business.

It is held in the case of George Runyan, Plaintiff in Error, v. The Lessee of John G. Coster and Thomas K. Mercien, 14 Peters, 122, that:

" * * * a corporation can have no legal existence out of a sovereignty by which it is created, as it exists only in con-

templation of law and by force of law. It must dwell in the place of its creation and cannot migrate to another sovereignty. But, where the statute of a State provides that a corporation may change its particular place of business from one point to another in the same State, it has such power."

It is also held that a corporation bank may, where no statutory law intervenes, establish a business in a foreign State as agent of the mother bank, but the rule is well established that a foreign bank corporation cannot have greater privileges in the conducting of its business in the State than those organized within the State. Such a law is reasonable and just. No foreign corporation should be allowed to transfer its franchise into a foreign State without complying with all the laws governing corporations of such State.

A banking corporation, however, where the statute of the State so provides, may remove its principal place of business from one place to another in the same county, or from one city or county to another city or county within the State; but where no such provisions are provided for in the law, a corporation has no right to remove its principal place of business, but a banking corporation may conduct business within the State and out of the city through its agents duly authorized. Such business, however, must be that which is given to the corporation by right, by organic law, and such ordinary business as its organic law gives it power to do. For example, an agency may exist for the redemption of bills; an agent may collect a note payable out of the State; a banking corporation may purchase a note in a foreign State. This is held and construed "not transacting business" in the State.

It is also held in the case of The President, Directors and Company, of Bank of Utica v. Smeeds & Canfield, 3 Cow. Rep. 662, that:

" * * * a bank corporation may make any contract within the scope of its general powers, and may bind itself to do an act at any other place, and whenever the engagement may be broken the bank will be equally liable."

In the case of Merchants' National Bank v. State Bank, 10 Wall. (U. S.) 604, the court, in referring to the powers of the national banks, says:

"Associations organized under the act of Congress to carry

on the business of banking are required by the expressed words of the act to transact *their usual business* at an office or banking house located in the place specified in their organization certificate, and no individual officer or party is allowed to leave his bank to go elsewhere to make large contracts without the instructions of the directors. Unless his power in that behalf is limited to the established place of business, he may go wherever he pleases for that purpose, and if he certifies checks anywhere within the four seas of our continent, the bank is bound by his contracts. Stockholders and depositors should take warning for such is the law, as the national banks are liable at any moment to be overwhelmed with pecuniary obligations and involved in utter ruin."

A bank located in one county and having its principal place of business fixed by its charter violates the same by establishing an agency in another county where it receives deposits, sells exchange, and conducts a general banking business unless the statute authorizes the privilege.

The court, in the case of The People *ex rel.* Zephaniah Platt, Attorney-General, v. The President, Directors, etc., of the Oakland County Bank, 1 Douglass (Mich.), 282, holds that "where, under the provisions of a charter which fixes the place of business, that the bank violates the law if it establishes an agency in another county;" and in discussing this question the court says:

"The last, and most important, question remains to be considered; and that is, whether the establishment of an agency in the city of Detroit was a violation of the charter of the defendants. By the act of the incorporation, the stockholders were authorized to locate the bank in the county of Oakland. It follows, therefore, that, if the corporation has undertaken to exercise any of its franchises without that county, it has usurped an authority in violation of law, and must suffer the penalty which that law inflicts. The case admits that the bank redeemed its bills, kept deposit, and, as incident to such redemption, bought and sold exchange at the agency. Did these acts, or either of them separately considered, violate the law which gave a legal existence to the defendants? To determine this question, it is only necessary to define what business this bank was authorized, by the law of its creation, to do

and perform. Such an examination will lead to the conclusion that it is a bank, not simply of discount, but also of deposit. It is quite manifest that the defendants could not establish in this city an office of discount. If so, may it not clearly be intended that they can establish an office of *deposit?* To my mind the conclusion is irresistible."

In the case of Kennedy Southern Railway v. Gebhard, 109 U. S. Rep. 527, the court says: "A corporation may do business in all places where its charter allows, and the local laws do not forbid." Where the statute of the State provides that an agency may be established within the State, such an agency may conduct a business for the parent bank. In doing so, however, by all of its signs and advertisements it must indicate to the public that it is acting simply as an agency of the parent bank. It has no authority to conduct through the agency a general banking business. It can do no business except in the name of the parent bank. If an agency could be established out of the county by the parent bank to do the general business of the corporation, it would be unnecessary to require the corporation to have a principal place of business named in its articles of incorporation.

Where the statute of a State provides that a corporation may remove its place of business, the proceedings of removal must be strictly complied with.

§ 164. Place of business.

In the case of Bank of Augusta v. Earle, 13 Peters, 519, Taney, Chief Justice, says:

"It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created, but, although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another."

It is broadly held by many of the courts that a corporation may be organized in one State and do all of its business in another State.[1]

[1] Missouri Lead, etc., Co. *v.* Reinhard, 114 Mo. 218 (1893).

It is also held in the case of Oakdale Mfg. Co. v. Garst, 18 R. I. 484, and in the case of The People v. Fidelity, etc., Co., 153 Ill. 25 (1894), that:

"* * * a corporation may be organized in one State and do all of its business in another State, but, a foreign corporation organized in a foreign State cannot enter another State and conduct business on more favorable terms than corporations organized in said State."

CHAPTER XVII.

INCREASING OR REDUCING CAPITAL STOCK.

§ 165. Law governing national banks.

Section 5142 Revised Statutes of the United States provides for the increase of capital of a national bank in the words and figures following:

"Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency."

Section 1 of the act of May 1, 1886, provides that:

"* * * any national banking association may, with the approval of the Comptroller of the Currency and by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum provided by the said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association, either within or beyond the limit fixed in is original articles of association, shall be made except in the manner therein provided."

A national bank desiring to increase the capital stock, the first step necessary upon the part of said association is to call a meeting of shareholders for that purpose, and at said meeting adopt suitable resolutions authorizing the increase. Before the resolution adopted at said meeting becomes lawful it must receive the votes of shareholders representing two-thirds of the existing stock. *A resolution passed by a vote of two-thirds of the shares represented at the meeting will not be sufficient.*

The succeeding step is to open subscriptions for the new stock; when all of said stock has been subscribed and paid for,

such proceedings should be certified to the Comptroller of the Currency.

It is held by the Comptroller of the Currency that:

"* * * in increasing the capital stock of a bank no moneys in the surplus fund, or to the credit of undivided profit account can be used except by the declaration of a dividend by the board of directors in the regular course, whereupon the shareholders, if they so desire, may use the proceeds thereof in payment of their subscription to the additional stock. Such portion only of the surplus funds as exceeds the amount required by law may be capitalized in the manner indicated."

The action of the Comptroller of the Currency, in approving of an increase of the capital of a national bank, and certifying that the amount thereof has been paid in, is conclusive, and the validity of the increase cannot be assailed in a collateral proceeding, such as an action to enforce the liability of a stockholder. If the stockholders have received their additional stock, and for several years held themselves out to the public as stockholders, they cannot subsequently, when the bank becomes insolvent, and they are assessed to pay its indebtedness, deny their liability upon the ground that the increase of capital was fraudulent.[1]

Under the United States Statute, national banks have the power to increase their capital to such a limit as may be approved by the Comptroller of the Currency.[2]

The capital cannot be increased for the entire amount until new capital stock has been paid in, and not until the Comptroller of the Currency has certified to the increase.[3]

It is held in the case of Aspenwall v. Butler, 133 U. S. 595, that:

"* * * when the previous proceedings looking to an increase in the capital stock in the national bank have been regular, and all that are requisite, and a stockholder subscribes to his proportionate part of the increase, and pays his subscription, the law does not attach to the subscription a con-

1 Upton *v*. Tribilcock, 91 U. S. 45.

2 Chubb *v*. Upton, 95 U. S. 665; Veeder *v*. Mudgett, 95 N. Y. 295; Scovill *v*. Thayer, 105 U. S. 143; Latimer *v*. Bard, 76 Fed. 536.

3 McFarlin *v*. National Bank of Kansas City, 68 Fed. Rep. 868; Charleston *v*. Peoples' National Bank, 5 S. C. 103.

dition that it is to be void if the whole increase authorized be not subscribed, although there may be cases in which equity would interfere to protect him in case of a material deficiency."

The same authority holds that:

"* * * the provision in the Revised Statute, section 5142, that no increase of capital in a national bank shall be valid until the whole amount of the increase shall be paid in, and the Comptroller of the Currency notified and his consent obtained, was intended to secure the actual cash payment of the subscriptions made, and to prevent watering of stock, but not to invalidate *bona fide* subscriptions actually made and paid.

"The Comptroller of the Currency has power by law to assent to an increase in the capital stock of a national bank less than that originally voted by the directors, but equal to the amount actually subscribed and paid for by the shareholders under that vote."

The right of shareholders to subscribe for new shares of stock, gives them the right to subscribe in proportion to their shares in the original stock. A shareholder, however, may waive his right to the new subscription. Such a waiver need not necessarily be given in writing, it may be given tacitly. Each shareholder has the right to subscribe to the new stock, and his right holds for a reasonable time, and until subscriptions are closed.

Where a stockholder has subscribed his proportion to double the capital stock, and pays his subscription, he cannot repudiate it because the stockholders, with the consent of the Comptroller of the Currency, reduced the amount of the stock they originally intended to issue.[4]

The same authority holds that:

"* * * a subscription to stock in a national bank and payment in full on the subscription and entry of the subscriber's name on the books as a stockholder *constitutes the subscriber a shareholder without taking out a certificate.*"

For a form of resolution to increase the capital stock of a national bank as approved by the Comptroller of the Currency, see Appendix.

[4] Pacific National Bank *v.* Eaton, 141 U. S. 227.

§ 166. Increasing capital stock of State banks.

The capital stock of all incorporated companies being generally fixed by the statute and the charter in the original articles of incorporation, it frequently, however, happens that the capital stock is found to be too small and an increase is demanded. Such a change cannot be made lawfully only under certain conditions and limitations. In the absence of express authority from the State, a corporation has no power to increase or reduce the amount of its stock.[5]

Where an attempted increase or reduction of the stock of the corporation is not authorized by the charter, and there is no authority given by statute, not even the unanimous assent and agreement of all of the parties interested would legalize the transaction.[6]

A State banking corporation, duly incorporated according to the laws of the State, may, where the statute so provides, at any time during the life of the corporation, increase its capital. The procedure defined by the statute must be strictly complied with.

It is held that:

"* * * an injunction is the proper remedy to prevent an illegal increase or reduction of capital stock of a corporation, but an injunction against the issue of new stock by a foreign corporation will be dissolved where the courts of the State, where the corporation was created, decide such issue of stock to be legal.[7]

In the case of White v. Wood, 129 N. Y. 527, it is held that "an increase of the capital stock without warrant or authority is called an over-issue of stock."

In the State of California the statute provides that:

"* * * no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness is void.

"Every corporation may increase or diminish its capital stock, create or increase its bonded indebtedness subject to the following provisions" (then follows the provisions of the

[5] Scovill v. Thayer, 105 U. S. 143, 148.

[6] Cooke v. Marshall, 191 Pa. St. 315 (1899).

[7] Cook on Corporations, 5th ed., § 281.

law providing the mode and requirements of the statute upon the subject).

It is held in the case of D. Stein, Appellant v. Charles Howard, *et al.*, 65 Cal. 616, that:

"* * * under the Code and Constitution of the State of California an increase of the capital stock of the corporation, and the issuing of the additional shares to be sold at a price less than the nominal value of the stock to supply funds actually required by the corporation, is not a fictitious issue of the stock within the meaning of article 12, section 11 of the Constitution."

In Jefferson v. Hewett, 103 California, 624, the court holds:

"* * * that under section 359 of the Civil Code which provides that no corporation shall issue stock or bonds except for money paid, labor done or property actually received, that certificate of stock issued upon credit is absolutely void."

It is also held in California that under the statute which provides that stock shall be void except for money paid, labor done, or property actually received, "that a note given in payment for stock with a valid consideration, is a legal issue of stock."

Where the statute of a State provides how a corporation may increase or reduce its capital stock, the courts have no power by mandate or decree, or in any other manner the right to affect the increase or decrease of the capital stock.

It is held in Smith v. North American Mining Co., 1 Nev. 423, and in Mechanic's Bank v. New Road Rd., 13 N. Y. 599, that:

"* * * when a corporation has issued certificates of stock (which are valid and not void) to the full extent of all of the shares which by law and the constitution of the company it may issue, no court can order the issuance of other shares because in that respect the powers of the corporation have been exhausted. Stockholders alone have the right to authorize the increase in the capital stock of the corporation. Where, by legislative act or charter, an increase of capital stock is effected by the act and assent of the board of directors, it is held that it must be ratified and authorized by the stockholders at a corporate meeting."

"The statute of the State governs the power, and may direct and authorize the directors of a corporation and vest them with power to increase the capital stock." [8]

§ 167. Reduction of capital stock.

National banks.—The Revised Statutes of the United States, section 5143, provides that:

"* * * any association formed under this title may, by vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

The Comptroller of the Currency recites that by his consent and the vote of shareholders owning two-thirds of the shares, a national bank may reduce its capital stock to any sum not below the minimum amount required by the National Bank Act. A reduction becomes operative upon the issuance of his certificate and approved.

An association that contemplates reducing its capital, should always advise the Comptroller thereof before formally submitting the matter to the shareholders. Before any final action can be taken in the reduction of the stock of such an association, steps should be taken to call a meeting of stockholders; the stockholders should then adopt a suitable resolution authorizing the reduction; two-thirds of the stock of the bank is necessary in the reduction; two-thirds of the quorum voting in favor of the proportion is not sufficient. A reduction of capital stock in no case can occur to reduce the capital below the minimum amount of capital required by section 5158, Revised Statutes of the United States.

Capital stock set free by the process of reduction belongs to the stockholders in proportion to the number of shares held by each. The stock cannot be retained by the bank for any purpose whatever; the released capital stock, from the date of the reduction certificate issued by the Comptroller of the Currency, becomes the property of the individual stockholders.

In the case of McCann v. The First National Bank of Jef-

[8] Southerland v. Olcott, 95 N. Y. 93.

fersonville, 112 Ind. 354, where the capital stock of the bank was shown to be impaired and the reduction was made to avoid assessments, the language of the court is as follows: "In the present case the reduction was not made to affect a distribution of the accumulated surplus or unemployed capital of the bank; the original capital had become impaired by reason of "*bad debts*," and the stockholders were in the situation of being compelled to elect either to submit to an assessment of their stock, or go into liquidation and reduce the capital of the bank so as to put the amount of the capital in correspondence with its value. They chose the latter alternative rather than submit to an assessment of their stock, so as to make good their deficiency; each stockholder surrendered a proportionate share of their stock, and by that means they secured the privilege of continuing the business of the bank with a reduced capital. The appellant, as appears from his complaint, surrendered his proportion, receiving as a consideration therefor immunity from the impending assessment, and the privilege of holding the residue of his stock in a continuing association. This was all the consideration he contemplated, and all that was implied in the transaction." [9]

Having received the whole consideration upon which the surrender was made, the stockholders could not afterward recover more, simply because the bank succeeded in realizing upon the suspended bills and notes, the suspension of which occasioned the reduction.

(For a form, as prepared by the Comptroller of the Currency, being the resolution to reduce the capital stock, see Appendix.)

It is held by the Comptroller of the Currency that "no part of the reduction can be carried to surplus or undivided profits without the unanimous consent of the shareholders. When the reduction is made the shareholders should return their old certificates. New Certificates, if the capital is reduced, should then be issued. It is competent to issue certificates for fractional shares."

The Comptroller of the Currency also requires that a record of the vote of stockholders should be kept and forwarded with the resolution.

9 Delano *v.* Butler, 118 U. S. 634.

§ 168. Reducing capital of State banks.

The capital stock of a State banking corporation can only be reduced by complying with the law as enacted in each State. The statute providing the steps to be taken and the proceedings to be had must be strictly complied with. In no instance can the capital stock be reduced to an amount less than the indebtedness of the corporation. In the State of California the statute reads that "no corporation shall diminish its capital stock to an amount less than the indebtedness of the incorporation." After an authorized reduction of the capital stock of a duly incorporated company it is held, that the "amount of corporate assets over and above the amount of the capital stock is reduced, and the debt is equivalent to surplus profits, and may be treated as such by the corporation. It may be set aside as surplus, or it may be divided among the stockholders proportionately, inasmuch as the rights of previous corporate creditors are not injured." [10]

And the same authority holds that "under certain circumstances the surplus may be used to buy outstanding shares of stock."

In Strong v. Brooklyn Cross Town R. R., 93 N. Y. 426, held:

"* * * where upon the reduction of the capital stock of a bank, certificates of deposit are issued to the stockholders to the amount of the reduction of the capital stock, such certificates of deposit can be enforced only to the extent that the actual assets of the bank exceeded its liabilities and reduced capital stock."

A distribution is only lawful when, upon investigation, it is found that the capital stock was unimpaired at the time of the decrease. The reduction of the capital stock of the corporation does not take place, and is not final in the State of California until the filing of the proper certificate in the office of the Secretary of State.

When the statute of a State makes a certificate conclusive proving that the capital stock has been reduced, the same cannot be questioned in a collateral proceeding, though the reduction was not made in accordance with the statute.[11]

[10] Cook on Corporations, § 289.

[11] Ladies, etc., Association, Limited, *v.* Pulbrook, 81 L. T. Rep. 300 (1899), aff'd (1900), 2 Q. B. 376.

CHAPTER XVIII.

CHANGING NAME OF BANK.

§ 169. Adopting new name.

The name of the corporation is an essential part of the instrument or articles of incorporation. It cannot exist or do business without a name. The law authorizing a bank to amend its articles of incorporation does not apply where the object is to change the name of the corporation. The name of a corporation may, or may not, designate its purpose. Where a new name is to be entirely adopted, this can be done only by complying with the special provisions of the statutes prescribing the mode of procedure.

When the name of a corporation is to be abandoned and an entirely new and different name to be substituted, it can hardly be an amendment, or classed as an amendment to the articles of incorporation. The articles of incorporation usually may be amended without application to a court of record, while in some of the States an application for change of name must be made to the court, and where a statute prescribes a mode of procedure it is mandatory and must be followed.

The National Banking Act provides by the act of May 1, 1886, section 2, that the name of a national bank may be changed; said section reads:

"That any national banking association may change its name * * * with the approval of the Comptroller of the Currency by the vote of shareholders holding two-thirds of the stock of such association. Duly authenticated notice of the vote and of the new name * * * shall be sent to the office of the Comptroller of the Currency, but no change of name * * * shall be valid until the Comptroller shall have issued his certificate of approval of the same."

The name of a national bank cannot be changed unless by consent of the Comptroller of the Currency. Section 3 of the act approved May 1, 1886, provides that:

"All debts, liabilities, rights, provisions and powers of the association under its old name shall devolve upon and inure to the association under its new name."

Section 4 of said act provides:

"* * * that nothing in this act contained shall be construed as in any manner to release any national banking association under its old name * * * from any liability, or effect any action or proceeding in law in which said association may be, or become, a party interested.

"A national bank desiring to change its name may call a meeting of the shareholders for that purpose, and by their directions direct that the president or cashier of the association submit the resolutions adopted by the shareholders to the Comptroller of the Currency, and if approved by him he will issued a certificate to the effect that the change has been approved by him."

When a State bank desires to change its name, after the preliminary steps have been taken by the shareholders of the corporation, and where a procedure is to be had in a court of record, an application may be made to said court, by petition or bill, setting out the necessary facts, and upon hearing, no objector intervening, the court may order a change of name; but where sufficient objections have been alleged by parties who would be directly injured, and a serious wrong be perpetrated upon some other friendly corporation having a similar name, the court would probably refuse the application. The statute of the State wherein the bank is located would govern the procedure, rights, and power of the corporation to change its name.

The statute authorizing a corporation to select its name will protect it in retaining the same, and the courts are inclined to protect the name of a corporation independently of any statute.

In Holmes v. Holmes, etc., Co., 37 Conn. 278, the court, in discussing this question, holds that "a corporate name, legally acquired, should be protected upon the same pricipal and to the same extent that individuals are protected in the use of trade-marks." "The case of an encroachment is analogous to, if not stronger than that of a piracy upon an established trade-mark." [1]

"In Massachusetts, by statute, a foreign corporation doing

[1] Newby *v.* Oregon Central Ry., 18 Fed. Cases. 38; Goodyears' India Rubber Co. *v.* Goodyear Rubber Co., 128 U. S. 598.

a banking, loan, trust, or investment business in the State cannot use the same name as, or a similar name to, a domestic corporation." [2]

In Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, New York Court of Appeals states the law as follows: "In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion, and to enable the latter corporation to obtain by reason of the similarity of names the business of the prior one. The courts interfere in these cases, not on the ground that the State may advise such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive. For the purpose of suits it is held that the original name remains unchanged." [3]

The changing of a name of a corporation cannot affect its real estate contracts.[4]

As to the right of a corporation to maintain an action on the contract or note executed, to-wit: In the old name.[5]

It has been held that where a corporation selects a name similar to one already in existence without the knowledge of such facts and without intention of deceit, the court may, in the exercise of its discretion refuse an injunction.[6]

In the absence of statutory provisions providing that a corporation may change its name, it has no power to do so.[7]

[2] Cook on Corporations, Vol. 1, (5th ed.), § 15; International T. Co. v. International Loan & Trust Co., 153 Mass. 271; The Illinois Watch Case Co. v. Piearson, 140 Ill. 423.

[3] Morris v. St. Paul, etc., Ry. Co., 19 Minn. 459.

[4] Wellfley v. Shenandoah, etc., Co., 83 Va. 768.

[5] Northwestern College v. Schwagler, 37 Ia. 577.

[6] Hygeia, etc., Co. v. New York, etc., Co., 140 N. Y. 94.

[7] Bellows v. Hallawell, etc., Bank, 2 Mason, 31; Sykes v. People, 132 Ill. 32.

CHAPTER XIX.

DEPOSITS.

§ 170. Nature of deposits.

A deposit made by a dealer with the bank (unless declared special), and placed to his credit as such, makes it a general deposit. There being no terms or agreement expressed or fixed between the bank and the depositor, that it is to be held by the bank as distinct from other deposits which are general, it therefore becomes what is termed a general deposit. The depositor in making a deposit in a commercial bank, does so with the implied promise that (unless some special agreement is entered into) it will repay the same upon demand. The money therefore becomes the property of the bank, and the bank has a right to the use of the same, but must repay it upon demand without grace. A general deposit is therefore one which deprives the depositor of the title to the funds until a demand is made for repayment; and it is at once owned by the bank, and ownership authorizes the bank to use the same until called for by the depositor. During such ownership the bank may loan the money and make profit therefrom. The position between the bank and the depositor in a commercial bank of a general deposit is always one of debtor and creditor, and the bank is bound by law to pay upon demand. A depositor in such a case is not required to give notice of a particular time when he will demand payment, but may present his check drawn upon the bank and against his account, without previous notice, and the amount withdrawn discharges the debt of the bank to the extent of the sum named in the check. When the position between the depositor and the banker is one purely of debtor and creditor, the bank cannot be held to the position of a trustee, but may loan such funds for the profit of the bank.

Special deposits are the placing of specific kinds of property, or money, in the possession of the bank, to be held by it in kind and returned to the bailor. The bank, in such a case, in

accepting the property or money, merely becomes the bailee of the depositor. *The distinction between a general and special deposit is, that if general, the depositor loses the title to the money; if special, the title of the deposit always remains with the depositor or bailor, and must be returned in specie or kind.* The insolvency of the bank does not change the position between the parties; the property must be returned, and the depositor is entitled to the identical property. A special deposit, if made in money and accepted by a bank, should not lose its identity and be mingled with or thrown into the general cash funds of the bank. The reason for this is evident, for it cannot become part of the general resources or liabilities of the bank, but it becomes a special liability and is governed by the law in such cases made and provided.

It is a well conceded principle of law that the banker and depositor may, at the time the deposit is made, make any lawful contract as to the terms upon which it is received, and also terms upon which it may be paid or returned.

§ 171. Nature of general deposits.

The relation of banker and depositor, where a general deposit is made in the bank, either on demand or on time, is one of debtor and creditor. As previously stated, a general deposit when placed in the bank becomes the property of the bank. The bank becomes a debtor to the depositor for the amount thereof deposited, and the debt can only be discharged by payment to the depositor or pursuant to his order.[1]

General deposits in a commercial bank, received on account of the depositor, when not complicated with transactions other than those of depositing and withdrawing the money, transfers the ownership of the money to the bank, and established a relationship between the parties of debtor and creditor.[2]

A deposit made in the usual course of business vests in the bank, and cannot be recovered by the depositor on the ground of fraud, even though the bank was insolvent and failed on the next day.

A deposit cannot be recovered by a depositor on the ground

1 The Ætna National Bank *v.* The Fourth National Bank, 46 N. Y. 82; Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152; Neeley *v.* Rood, 54 Mich. 134, 52 Mich. 132; 17 Wend. (N. Y.) 100; Collins *v.* State, 15 So. 214.

2 Collins *v.* State, 15 So. 214.

of fraud, even though the deposit is made in reliance and on representation by the cashier of the bank that the bank was solvent, unless the officer of the bank knew of its insolvency at the time of the deposit.

A depositor making a deposit in a bank may, at the time of making the same, *contract with the bank to whom the deposit shall be repaid.*[3]

The public funds of a municipality may be deposited in a bank and the bank may agree to pay interest on such deposit, and can also give a bond to the municipality for security.

The statute of the State may provide otherwise. The Constitution of a State may also make the receiving of such a deposit, when received as a general deposit, unlawful. Where such a statute or constitutional provision is in force, the deposit cannot be made and received as a general deposit.

A party acting as a trustee and making a deposit in a bank, placing the same to his credit or private account, without notifying the bank that the same is a trust fund, the bank having no knowledge of the fact that he is a trustee, but believing that the property is his own private property, the bank does not become liable to the *cestui que trust.*[4]

Where a bank has knowledge of the fact that money deposited with it to the general credit of one of its depositors is held in trust by such depositor, the bank cannot apply the deposit, or any portion thereof, to cancel a note due from the depositor to the bank.[5]

A deposit made in a bank at a time when the officers knew that it was in a failing condition and insolvent, held, that it cannot be recovered from the assignee, unless it can be identified and traced to his hands.[6]

Where a party mails to a bank money or checks, directing that the bank place the same on deposit to his credit, but the bank refuses to acknowledge receipt thereof, and persistently denies that it has received such money or checks, the relationship of depositor and depositee is not established.[7]

3 Sykes *v.* First National Bank, 2 S. D. 242.

4 School District *v.* First National Bank, 102 Mass. 174.

5 57 Illinois App. 107, reversed; Clemer *v.* Drovers National Bank, (Ill. Sup.) 41 N. E. 728.

6 *In re* Commercial Bank, (Ct. Insolv.) 2 Ohio N. P. 170.

7 Miller *v.* Western National Bank, (Pa. Sup.) 33 A. 634.

A bank makes itself liable, if in any way it colludes with a trustee where it may hold such funds, if the trustee misapplies the same, and the *cestui que trust* may refuse to look to the trustee, and can recover from the bank, holding it responsible for any liability or damage accruing to the *cestui que trust*.

Where a person designates himself as a trustee for another, and deposits the funds of his *cestui que trust* in a bank, it has been held that there is a complete and valid transfer of the title to the funds, the title thereby immediately vests in the donee, and the personal representative of the donor cannot recover them from the bank.

Trust funds have caused more or less complication and liability in the withdrawal of the same, but the law seems to be well settled and established, that if a trustee deposits trust funds to his own account, and with his individual money, the bank having no knowledge of the fact, that it may pay all checks when signed and presented by the party making the deposit.

Where an agent or trustee deposits money belonging to his principal in a bank, to which he himself is indebted, and the bank without authority and in ignorance of the true ownership of the fund, applies it on the debt, the owner may recover from the bank if it can be identified.[8]

When a customer of a bank who has overdrawn his account, and afterward makes a deposit, the presumption of law is, in the absence of evidence, that the deposit was general, and that it was made and received toward the payment of the overdraft.[9]

Where a bank depositor heard rumors of its insolvency and went to withdraw his deposit, but was informed by an officer of the bank that it was perfectly solvent, the depositor, relying on such representation, and permitting his deposit to remain, when in fact it was insolvent at the time the representations were made, such officer is personally liable to such depositor.[10]

Where a national bank has been designated as a depository of public moneys, such designation does not constitute it as an agent of the government or render the government liable for moneys lost by failure of the same.[11]

A national bank receiving State funds, subject to check and

[8] Burtnett Admr. *v.* First National Bank, 38 Mich. 630.

[9] Nichols *v.* State, (Neb.) 65 N. W. 774.

[10] Townsend *v.* Williams, (N. C.) 23 S. E. 461.

[11] Branch *v.* The United States, 1 N. B. C. 363.

to withdrawal thereof on seven days' notice, and giving security therefor; also agreeing to pay interest on daily balances, the transaction is held to be one of deposit and not a loan.[12]

In the case of Quin v. Earle, 95 Fed. Rep. 728, the court holds that:

"To authorize the recovery of a general deposit from the receiver of an insolvent bank on the ground that the bank was insolvent, and known to be so by its officers when the deposit was received, and that the fraud authorized a recision of the contract by the depositor; the thing deposited or its proceeds must be capable of identification in the hands of the receiver or it must appear that the funds coming into his hands were increased by that amount."

The court further says:

"To constitute fraud on the part of a bank, in receiving a deposit when insolvent, which will authorize a recision by the depositor and a recovery of the deposit from a receiver subsequently appointed for the bank, the officers of the bank must have known or believed that it was insolvent at the time the deposit was received; and such knowledge cannot be presumed, but must be proved. The mere fact that the bank was known by the officers to be in an embarrassed condition is not sufficient to establish fraud."

Where checks are delivered to the bank by a depositor for collection and deposit at the time when the bank was insolvent, and when it was known by its officers to be insolvent, which checks had not been collected when the bank closed its doors, they remain the property of the depositor and cannot be held by the receiver.[13]

A party who has sufficient funds in a bank and draws a check on the same for payment, while the funds are not in any way encumbered by an earlier lien in favor of the bank, on refusal to pay the check, he may sue the bank for damages.[14]

Where, after the maturity of a promissory note held by a bank, and protest thereof, the maker of said note makes a general deposit of an amount sufficient to pay the note, held that this does not of itself, as between the bank and indorser, operate

12 State of Neb. *v.* First National Bank of Orleans, 88 Fed. Rep. 947.

13 Richardson *v.* Denegre, 93 Fed. Rep. 572.

14 Mt. Sterling National Bank *v.* Green, (Ky.) 35 S. W. 911.

as a payment. In the absence of an agreement between the parties, the bank has the option to apply the money in payment; but it is under no legal obligation so to do.[15]

The writing-up by the bank, of a pass-book, in other words what is called "balancing of a pass book," and the delivery thereof to the owner, does not preclude the owner of inquiring into its correctness.[16]

A pass book made transferable by the by-laws of a bank, may bind the parties thereto, but it would not be so as to third parties.[17]

But an assignment and transfer of a pass-book with an order to pay the balance then due, would bind all parties and the bank could not refuse payment on the order or check. It is held in the case of Arnold v. Hart, 176 Ill. 442, that pass-book when balanced and delivered binds the bank, and operates in the same manner as an account stated. This can hardly be the law. *An account stated is an agreed balance of accounts. An account which has been examined and accepted by the parties.* While the pass-book is a statement of an account, it does not become binding upon the parties as an account stated until it has been agreed between the parties that a balance fixed which has been examined and accepted by the parties is found to be due. An error may be found by examination of the pass-book, and the bank balancing the same should also have the privilege of correcting any error found therein. An entry is a pass-book cannot be conclusive against either the bank or the customer. The entries therein made, may be inquired into. It is a question of fact and subject to investigation.

The law may provide that after a certain period of time, both parties may be estopped by a Statute from investigating or making any corrections.[18]

§ 172. Special deposits.

Originally, all deposits of money deposited with a banker, was a special deposit. The custom prevailing at that time required the banker, when called upon, to deliver to the de-

15 The National Bank of Newburgh, Respondent, v. Daniel Smith, Appellant, 66 N. Y. 271.

16 First National Bank v. Whitman, 94 U. S. 343; Bullock v. Boyd, 2 Edw. Ch. (N. Y.) 292; Bank v. Earp, 4 Rawle (Pa.) 384.

17 Whitte v. Vincenot, 43 Cal. 325.

18 French v. Banking Co., 91 Me. 485.

positor, the same identical coin, the depositor agreeing to pay the banker a compensation for the care of the property.

Special deposits are accepted by bankers at the present time, and such deposits, may be taken gratuitously or upon compensation.

It is a well settled principle of law, that all banking corporations organized for the purpose of conducting a banking business, with the right to receive deposits, unless prohibited by Statute or the bank's charter, may accept on deposit, special deposits of money, stocks, bonds, or other personal property for safe keeping, either for compensation or gratuitously.

Special deposits as stated, are placing specific kinds of property, or money, into the care or possession of the bank to be held by it and returned at some future time. The bank, in such a case, becomes the bailee of the depositor, and upon demand by the bailor the property must be returned.

Special deposit when made in money, should never lose its identity or be mingled with or thrown into the general cash funds of the bank. The reasons for this, as stated are obvious. The money so deposited cannot become a part of the general resources or liabilities of the bank, but becomes a special liability and is governed by the law of bailment.

The distinction between a general and special deposit, as previously stated, is this, *when general, the identity of the property is lost. If special, it should at all times be capable of being identified.* A special deposit of money can be made as stated, and be returned and be identified. If, however, it is allowed to be intermingled with the general cash funds of the bank, it must necessarily lose its identity and thereby become a general liability of the bank.

National, State Commercial Banks, and Savings Banks, without a special prohibitive provision enacted in their charter, have the right to accept special deposits. A mutual savings bank organized and conducted purely upon the mutual principles, unless such a provision is enacted into its charter, has no authority incidental or otherwise, to accept special deposits.

It is held that a national bank has authority to accept special deposits:

1. Upon the ground that it is a power incidental to the banking business.

2. That section 5,228 of the Revised Statutes of the U. S. implies the authority that a national bank may receive deposits of bonds and securities for safe keeping, either for a compensation or gratuitously.[19]

But the question as to whether the cashier or other executive officer of a national bank, has the authority to take a special deposit for safe keeping without direction from the board of directors, is questioned. The authority must be implied by custom or usage and known to be exercised and sanctioned by the board of directors.[20]

The question, however, is different even without authority expressed or implied, where the bank habitually receives special deposits, it will be bound by the acts of the officers receiving the same.[21]

When a special deposit is received by the bank and is lost through the gross negligence of the officers, managers or employees thereof, the bank will be held liable to the owner for the value of the deposit.[22]

It is held that where a national bank receives United States bonds of a certain class, with instructions to have them converted into bonds of another class, for a failure to deliver the bonds on demand the bank becomes liable.[23]

It is the duty of a national bank or other bank where property deposited with it as a special deposit, and is stolen by burglars, to take active steps for the recovery of the property and a failure to exercise proper diligence and care in performing such an undertaking, the bank may be held in damages for such failure.[24]

In an action against a national bank to recover bonds deposited with it for safe keeping without compensation, and which the bank alleged were stolen from it vaults, it was held:

1. That the bank was liable only for gross negligence.

2. That a failure to give prompt notice of the robbery

19 Pattison v. Syracuse National Bank, 80 N. Y. 82; National Bank v. Graham, 100 U. S. 699.

20 Wiley v. First National Bank of Brattleboro, 47 Vermont 546; National Bank of Lyons v. Ocean National Bank, 60 N. Y. 278.

21 Chattahoochee National Bank v. Sehley, 58 Ga. 369; Pattison v. Syracuse National Bank, 80 N. Y. 82.

22 National Bank v. Graham, 100 U. S. 699.

23 Leach v. Hale, 31 Ia. 69.

24 Wylie v. Northampton Bank, 119 U. S. 361.

was a question for the jury, as bearing on the question of negligence.

3. That the voluntary act of the cashier in receiving the property would not subject the bank to liability; yet, if the deposit was known to the directors and its retention acquiesced in, a contract relationship would exist and the bank would be held liable.[25]

Property taken by a national bank for safe keeping, where the same is agreed to be cared for without compensation, is only liable for gross negligence.[26]

Where the statute of a State prohibits a State bank from receiving special deposits from a city, of city funds, a provision in the bank charter authorizing the officers to accept such deposits is a direct violation of law; and a bank that accepts such deposits endangers its charter privileges, and is subject to an action which may be brought by the State to have its charter forfeited. But where the Statute is silent upon the subject, and the charter provides that special deposits of money or property may be taken by the bank, it is not necessary to specially delegate such privilege to the managers and officers of the bank.

But where the charter is silent upon the question, and there is no authority granted to the officers through the by-laws of the bank to accept special deposits of money or property, the bank cashier is without authority to accept such deposit.

Where a charter of a bank does not specifically authorize the establishment of a safe deposit department, the power to conduct the same for special deposits of property or money is purely incidental to the business of banking, and to what extent this authority may be conducted is of serious consequence. The Comptroller of the Currency, while admitting that there is no provision in the National Banking Act, authorizing national banks to invest any considerable sum of money in the building of safe deposit vaults (which may be used for the special deposit of money or other property) holds; that a reasonable sum may be invested for such purposes, and

25 First National Bank of Carlisle *v.* Graham, 79 Pennsylvania State 106, affirmed 100 U. S. 699.

26 De Haven *v.* Kensington National Bank, 81 Pennsylvania State 95.

that it is a matter largely within the discretion of the directors of the bank.

To what extent this discretionary power may be carried is not determined by the Comptroller, and it is impossible for him to have the knowledge of the extent to which it may be carried by the bank.

It would, therefore, seem to be a privilege purely incidental to that of banking, and where not authorized by the Statute or the charter of the bank, the limit or extent to which the power could be carried, should be defined by the proper authority in a by-law, as all incidental powers of this nature should be specified and governed by a by-law.

It is a well established principle, that a national or State bank has the authority and right to refuse either general or special deposits, and may arbitrarily select its customers from among those that apply.

Where a bank receives a special deposit in gold coin of the United States, and agrees to return the deposit in *lawful money of the United States,* it may pay in money which is current funds.

It is held in the case of Mayer and Lowenstein v. The Chattahoochee National Bank, 51 Ga. 325, that where "A" makes a deposit of money with a bank, specifying that the deposit is made for the express and special purpose of paying a certain debt, which he "A," had already or would draw checks to pay; that the deposit became a special one and that it continued the property of "A," the debtor, until the bank paid the debt or agreed to pay it.[27]

The liability of the bank only attaches where it agrees to see to the application of the money.

§ 173. Deposits of paper.

Where checks are received and credited as cash, the rule is, that it becomes a general deposit. Checks are, however, generally credited as cash with the understading implied, that if payment is refused upon them, that the depositor's account will be charged with the amount. The credit given by the bank

27 Owen *v.* Bowen, 4 C. & P. 93, 96; Surtees *v.* Hubbard, 4 Esp. 203; Wharton *v.* Walker, 4 B. & C. 163.

upon checks so deposited, allows the depositor to draw upon his account at once, and the bank upon refusal of the depositor to repay the amount of such, refused and returned checks, it is claimed the bank would have no right of action.

The rule is again stated that where the title passes to the bank, a general deposit arises, and when credit is given on a check deposited and properly endorsed, the title passes to the bank, and an implied understanding or promise to pay all such checks which may be returned, lacks the elements of an agreement upon which the bank could sue.

§ 174. Liabilities of banks for special deposits.

The general rule is, *that a bank is only responsible for gross negligence where it receives on special deposit, property without reward.* The Court in the case of First National Bank v. Ocean National Bank 60 N. Y., 278 says:

"Gross negligence is incapable of precise definition, and its application and use may lead, in some cases, to results unsatisfactory; but that comes as directly from the nature and extent of the duty in the particular case, as from the phrase by which a breach of the duty is expressed. What constitutes gross negligence, that is, such want of care as would charge a bailee for loss, must depend very much upon the circumstances to which the term is to be applied. It has been defined to be the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description. This definition is given by a reference to the degree of care, rather than the degree of negligence, which may be the easier and more intelligible mode of defining the extent of the obligation, and the measure of duty assumed. Ordinary care as well as gross negligence, the one being in contrast with the other, must be graded by the nature and value of the property, and the risks to which it is exposed. A depositor of goods or securities for safe keeping with a gratuitous bailee, can only claim that diligence which a person of common sense, not a specialist or expert in a particular department, should exercise in such department."

"The bank, as depository, taking no pay and taking no risks, was (is) not bound to resort to any special or extraordinary measures to protect the property of the depositor, and the negli-

gence for which it could be charged, or which was the proper subject of evidence upon the trial, was only that which was connected with, and directly contributed to the loss. Independent acts of negligence, disconnected with the loss, were not properly admissible in evidence."[28]

"The defendant was not chargeable with negligence or want of care for not acting upon facts or circumstances not coming to the knowledge of its directors or officers. Facts not brought home to them, tending to show that the property was exposed to loss from some unusual cause, to some peril growing out of peculiar circumstances, were not admissible in evidence against the defendant. The bailee was only called upon to take such care as became necessary to protect it against risks known to it, or of which it had notice. There was great latitude in the evidence on the part of the plaintiffs, and some of it was quite dramatic in its character, the purpose and end was to show that the place of deposit was peculiarly and extraordinarily exposed to perils from robbers at that time, calling for more than the usual cautions from the bailee. This was competent, so far as facts and circumstances proved to exist were communicated to the officers of the bank, but no farther."

In the further discussion of the question defining gross negligence, the case of Thomas E. Patterson, Respondent, v. The Syracuse National Bank, Appellant, 80 N. Y. 82 very clearly defines the facts which constitute gross negligence. The syllabi in said case is as follows:

"In an action to recover damages for a special deposit alleged to have been lost through defendant's gross negligence, it appeared that plaintiff delivered to defendant's teller, at its bank, for safekeeping, a package containing certain bonds. Defendant had been accustomed to receive for that purpose, packages supposed to contain securities and valuables. Some of these were left by its directors.

"The cashier of the bank had the control and management of its affairs. It did not appear that the president took any part in its management, or that the directors held any meetings. The teller sometimes acted as cashier in his absence. Some time before the deposit, the cashier said something to the

28 Scott v. National Bank of Chester Valley, 72 Pa. St. 471.

teller as to their not taking any more packages for safekeeping. The teller testified that this was not a positive instruction, but merely an opinion, and that he did, after that, receive packages. He also testified that he told plaintiff when the deposit was made, that it would be at his own risk; this was contradicted by plaintiff. The teller also testified that the cashier sometimes told persons depositing packages, that they would be at their own risk, and at other occasions, packages were received without such notice. The package so left by plaintiff was kept in defendant's bank for about two years before its loss, being occasionally taken out by him to cut off coupons, and then returned. Held, that the evidence justified the submission to the jury of the question of the authority of the teller, and whether the deposit was with the bank; and, this having been found, that defendant was bound to return the bonds when demanded, or to show some sufficient ground for not doing so.

"There was no direct explanation of the manner of the loss, but the evidence tended to show that the bonds were stolen in the daytime, when the bank was open. They were kept in a safe, so placed as to be accessible to any person entering the bank from the street, while those in the bank were so placed that at times the safe was not in their view, and sometimes the door of the safe was left open. Held, that the evidence authorized a finding, that the bonds were stolen by some one coming in from the street; and that leaving the property thus exposed was gross negligence."

Where there is neither fraud or gross negligence imputable to a bank, it is not liable for loss of a special deposit, which has been stolen from the bank. In the case of J. D. Whitney v. The First National Bank of Brattleboro, 55 Vt. 154, it is held by the court, that where a naked deposit is made with a bank, without reward, that it cannot be held liable for the robbery or larceny of bonds deposited with it, unless there was complicity or bad faith; that the law demands good faith and the same care of the plaintiff's property as defendant took of its own of like character.

§ 175. Negligence in delivery of special deposits.

A bank holding property on special deposit in delivering the same, must use the same degree of care as is required of it

in keeping it safely on deposit. A bank is held liable where the teller is guilty of gross negligence in failing to identify the owner, and delivers the property to one not the owner. The bank would also be held liable in delivering the property upon an order which is a forgery. In the case of Ganley v. Troy City National Bank, 98 N. Y. 487, the court held, that where "A" left certain securities with a bank for safekeeping, and for which the bank executed a receipt duly signed by it, that said securities would be delivered by it on the surrender of the receipt; and the bank delivered to "A's" husband the securities without requiring production of the receipt, it was held that the bank was still liable to "A" the bailor.

In the case of Anderson v. Pacific Bank, 112 Cal. 598 (44 Pac. 1063), the court holds that the bailor will be entitled to recover interest on a special deposit from the time the bank wrongfully refused to return it.

§ 176. Bank deposits received.

At common law, a bank has the authority to receive or reject a deposit. The statute does not attempt to regulate this privilege. It is one incidental to the rights of the bank which cannot be questioned or legislated upon. A statute would be unconstitutional, which if enacted declaring that a bank must receive on deposit, all deposits offered to it; but a statute enacted, prohibiting banks from receiving public funds (taxes collected from the people by municipal authority), and placing such funds in the bank upon general deposit and mingling them with the general deposits, may be prohibited upon the theory that they are trust funds, and as such, must be held and retained by the officer representing the municipality.

The relationship existing between the bank and the depositor, may at any time, by either party at option, be dissolved. This rule holds unless the bank has accepted a deposit and agreed with the depositor to retain the same for a specific time and pay interest thereon for the use and retention of said deposit; in such a case, the deposit is received in the nature of a special contract, and is binding upon the bank and the depositor.

A deposit, when made in a bank, should always be made to an agent of the bank, who at the time represents the bank; but the deposit need not necessarily be made to the receiving teller

of the bank, but must be made to some officer or agent of the bank, who, at the time of receiving the deposit, represents the bank. If made to a person claiming to represent the bank, when in fact he does not, the bank will not be held responsible. It is therefore important to the depositor to know who are the agents of the bank.

The rule that the bank is not liable, where an officer or other agent of the bank, other than a receiving teller who has been delegated to alone receive the deposits is not the law. Any duly authorized agent of the bank may bind it by receiving deposits. A notice posted in a bank "deposits received" and the words "receiving teller" is not a sufficient notice to the depositor that no other officer or agent of the bank other than the receiving teller, cannot receive a deposit and bind the bank. It has been held by numerous authorities,[29] that the cashier is the proper officer to receive deposits, also to give certificates of deposits; and likewise the power rests with him to accept or refuse the account of one desiring to become a depositor; but the rule is not laid down in any of the cases above cited, that he is the only officer authorized to receive deposits.

The president of a bank, by inherent power, has the right to receive a deposit for the bank.[30]

The rule is, *that any agent of the bank who receives a deposit from a customer within the bank during banking hours, binds the bank.* The bank cannot set up a defence that it is not responsible because the deposit was not received or passed through the hands of the receiving teller.

A deposit is complete when it passes from the possession of the depositor into the hands and into the possession of the agent of the bank, if at the time of the transaction it was performed within the bank and during banking hours.

In the case of the East River National Bank, Respondent, v. Francis N. Gove, Appellant, 57 N. Y. 597, the court very correctly states the law upon this subject. The case is so replete

[29] The Merchants' Bank *v.* State Bank, 10 Wall. 604; L'Herbette *v.* Pittsfield National Bank, 162 Mass. 137, 38 N. E. 368 (1894); White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Atlas Bank *v.* Nahant Bank, 3 Met. (Mass.) 581; Dill *v.* Wareham, 7 Met. (Mass.) 438; Morville *v.* American Tract Society, 123 Mass. 129; Davis *v.* Old Colony Railroad, 131 Mass. 258; Ellerbe *v.* National Exchange Bank, 109 Mo. 445.

[30] Bickley *v.* Bank, 43 S. C. 528, 21 S. E. 886 (1892).

and so conclusively sustains the rule that any agent of the bank while representing the bank and within the bank and acting during banking hours, binds it that we here quote from the opinion.

"There were in this bank, besides the cashier and bookkeepers, a paying teller and a receiving teller; the general duty of the former being to pay the moneys of the bank, and of the latter to receive money paid to or deposited in the bank. In the absence of the receiving teller, other clerks and officers of the bank acted in his place. The defendant had for some years been a dealer with the bank, and he knew that there were a paying and a receiving teller. There was no proof that the receiving teller was in the bank on the twenty-eighth day of August, when the defendant made the payment. For aught that appears, the paying teller was then the highest officer of the bank present. The defendant had several times been spoken to, to make the mistake good. He received the letter from the paying teller and went to the bank, and, upon his request, paid him the money over the counter. There was no proof that the paying teller was not, in fact, authorized to receive this money. He testified that he was not accustomed to receive money from depositors. But this payment was not a deposit. It was a payment of a debt due the bank; there was no proof that defendant had any reason to believe that Van Orden was not authorized to receive this money, except the fact that he was the paying teller. Under such circumstances, I hold that the payment to the paying teller was a good payment to the bank.

"The defendant went to the bank, he found behind the counter the paying teller who asked him to pay a demand the bank had against him, and he then paid it. *It would be a very inconvenient and unreasonable rule to hold that bank was not bound by such a payment.* If this payment was not binding upon the bank, it would not have been if Van Orden had declared to the defendant that he was authorized to receive it; and if every clerk then in the bank except the cashier had, upon the inquiry of the defendant, made the same declaration. If he had gone to the bank to pay a note and the paying teller had gone to the vault and got the note, taken the money and

surrendered up the note, upon the same principle such a payment would not have bound the bank. *Banks must be held responsible for the conduct of their officers within the scope of their apparent authority. When one goes into a bank and finds behind the counter one of its officers employed in its business, and upon his demand pays a debt due the bank in good faith, without any knowledge that the officer's authority is so limited that he has no right to receive it, he must be protected and the bank must be bound by the payment.*"

The rule then is, *as stated in* Cyclopedia of Law and Procedure, volume five, p. 516, "*The payment of a deposit to anyone serving behind the counter of a bank is valid, and if he retains the money for his own use, the bank is liable.*"[31]

The same authority lays down the rule that "the same principle applies to a bank whose officers receive special deposits of bonds and other securities."[32]

The rule would be different if a person dealing with the agent knew at the time that the agent was acting without authority.

§ 177. Kinds of deposits received.

A special deposit when authorized to be received by a bank, must as formerly stated, be safely kept and *that identical thing* returned to the party making the deposit.

Where a customer presents to a bank a certain amount of money, and directs that it be received to be applied at some future date, to the payment of a check specifying it, which may be presented, or to be used in the payment of a claim which may be presented against him (the depositor), such a deposit is not a general, but a special deposit. The deposit, although in money, cannot be placed to the credit of the depositor and become a general liability of the bank. It must be retained for the specific purpose named.

31 East River Nat. Bank *v.* Gove, 57 N. Y. 597; Sweet *v.* Barney, 23 N. Y. 335; Hotchkiss *v.* Artisans' Bank, 2 Abb. Dec. (N. Y.) 403, 2 Keyes (N. Y.) 564; Ihl *v.* St. Joseph Bank, 26 Mo. App. 129; McCann *v.* State, 4 Nebr. 324; Rich *v.* Niagara County Sav. Bank, 5 Thomps. & C. (N. Y.) 589; Jumper *v.* Commercial Bank, 39 S. C. 296, 17 S. E. 980, 48 S. C. 430, 26 S. E. 725; Bickley *v.* Commercial Bank, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721.

32 Foster *v.* Essex Bank, 479, 9 Am. Dec. 168.

It is advisable, where special deposits are received by banks, to have a special deposit book or ledger for the purpose of entries, and in which should be entered the conditions upon which each deposit is received. Where such a record is not kept by the bank, written instructions should accompany the deposit directing the nature of, and disposition of the same.

It frequently occurs that a customer will deliver to his bank, a check drawn upon some foreign bank, directing that it be used for a specific purpose for example, "when 'A' presents a deed accompanied by a certificate of title showing the title to be perfect in the grantor mentioned in the deed; the money is then to be applied in payment for the property conveyed." Such transactions are common, and the deposit of the check cannot be presented and cashed until the deed and certificate of title are delivered to the bank. In this case, the bank cannot be held for failure to present the check; but if the bank is instructed to collect the check and hold the money for the purpose designated, and it fails to present it for collection within a reasonable time, the bank may be held liable.

If such a deposit is made, and the bank accepts the conditions it will be held as by a contract and must comply with the same.

The court holds, in the case of American National Bank v. Presnall (48 Pac. 556), that where a *check* was delivered to the cashier of the bank, and for which he gave a writing as follows: "Deposited with American National Bank, Arkansas City, Kansas, by J. K. Presnall, October 18th, 1890, $22,200, to be delivered to Presnall upon clear abstract of property, on deeds left with me. H. M.. Lamsen C."

It was shown by the evidence, that the document signed "H. Lamsen, C." was executed by the cashier in his official capacity, and that in fact he only received a check. In construing the document the court says, "*In effect it is stated that the deposit is made with the bank; that the deposit is money and not a check.*"

As stated in this case, a check was deposited, but the bank through its cashier, acting in his official capacity, gave a "deposit slip" showing upon its face that money was deposited and the court contended that the bank was held by the document and must make good the amount in money.

In receiving a check, as a special deposit, the bank may elect to collect the same and hold the money in its place, if not otherwise specifically instructed; but in such a case, the bank cannot open an account in the name of the party depositing the check, but must retain and hold the money to execute the trust and purpose for which it is to be used.

Where a clerk of a Court of Record, under order of the court, deposits money in a bank and the money is mingled with and becomes a part of the common fund, and the bank becomes a debtor therefor, the deposit is general.

"If the deposit had been placed in a separate package and so deposited and never mingled with the funds of the bank; or had it been so kept that its identity could be established, it would no doubt have been different."

A special deposit may be changed to a general one or vice versa, for example, "A" may deposit a note with a bank for collection, while the note remains unpaid it assumes the nature of a special deposit, to be returned if not collected; but after collection, the proceeds may be in the absence of other instructions, placed to the credit of the owner. It then becomes a general deposit.

In California it is held in Howard v. Roeben, 33 Cal. 399, that where one makes a special deposit of gold coin and afterward contracts with the bailee to pay interest on the same, the special deposit is turned into a general one.

CHAPTER XX.

DEPOSITS REPAID.

§ 178. When and how paid.

A general deposit of money when made and placed to the credit of the depositor, from that time becomes a debt due from the bank to the depositor, *and unless a stipulated time is agreed* upon between the depositor and the bank when the deposit is to be repaid, the law implies a liability upon the part of the bank for its repayment to the depositor at any time when demand is made.

It is not necessary that the depositor should have a contract or agreement in writing, executed by the bank, agreeing to repay the same. The entry of his deposit in a book furnished by the bank showing its liability to the depositor is sufficient.

It is a presumption of law, that when money is deposited in a bank and credit is given in the name of the party depositing the same, that it belongs to the party making the deposit, and the bank is justified in honoring the check of the party making such deposit. A third party may make a claim of ownership to the funds, but a simple claim or notice to the bank verbally made by the claimant that such funds when deposited in the name of another, are his funds or property, cannot be construed by the law as a sufficient notice to the bank, and as a justification of its right or refusal in the payment of checks signed and presented by the depositor. But if the bank has been enjoined by process of law from paying such funds to the depositor, it may refuse to pay the same until the injunction is dissolved.

Where deposits are made in the name of a firm, complications may arise in the payment of checks, especially so, if the bank should pay out money upon the individual check of one member of the firm. If this is done, and the firm should claim that the funds withdrawn were withdrawn without authority, the bank can only justify its action by proving that the money drawn by the individual member was applied to

the use of the firm. To avoid such danger and complications, it is advisable that the bank, when such an account is opened, and before checks are paid, require the firm to empower some one member thereof to draw and sign checks in the name of the firm, upon the account in the bank. The power of attorney, authorizing this, being filed with the bank would establish the right of the party to draw checks and relieve the bank from all complications and liability.

Savings banks have two classes of deposits, ordinary and term. The ordinary deposit is somewhat in the nature of a commercial deposit. It may be one wherein the bank will agree to repay up to a certain sum or fixed amount on demand and without notice. When this rule or agreement is entered into between the parties, interest upon the sums are generally waived.

The depositor in a savings bank, however, where his deposit is classed as ordinary, is governed by the same law in relation to his rights and claims against the bank in case of insolvency, or liquidation, and is placed in the same position as the term depositor.

But the law is well established that before an action can be maintained by a depositor against the bank, he must first have made a demand upon the bank for repayment. This demand may be in the presentation of a check signed by the depositor against his account held by the bank.

A depositor's account or deposit in the bank remains a liability against the bank until the statute of limitations bars a right of action. In some of the States the statute will not run against the depositor. The depositor is not entitled to interest upon his deposit made in a commercial bank, unless by special contract entered into by the bank, interest is agreed to be paid; and it seems to be a well settled principle of law upon this subject that, unless the by-laws of the bank authorize interest to be paid to depositors, that the officers of the bank who enter into such contracts with depositors without first having such authority from the board of directors, have violated certain principles of banking, and as between themselves and the bank, are personally liable. It is not claimed, however, that as between the depositor and the bank that the bank would not be held liable.

If certificates of deposit have been issued and a specified time agreed upon when the money should be repaid, the depositor cannot demand repayment of the same before the expiration of the time; neither can the bank, upon the other hand, pay the depositor upon such certificate before its maturity for the purpose of evading the agreement to pay interest on the same.

A term deposit is one wherein it is generally stipulated between the parties by contract, that the same shall be withdrawn from the bank only upon notice duly served. This notice when given, if the by-laws require it, must be in writing, specifying that the depositor demands repayment of his deposit within the time which the bank stipulated to repay the same. Banks may repay without notice, electing to waive the same, but they have a right where such contracts have been entered to demand notice before repayment. Savings banks through their by-laws when properly enacted, can fix the time required to be given by a depositor before the withdrawal of his money, his right to withdraw the same being a contract between the parties, and before withdrawal he must comply with the terms of the agreement and the by-laws.

It is unnecessary to state that a bank cannot pay out its funds held for one on deposit upon an oral order. It can do so, but in doing so it is done at its risk. Money paid upon an oral order, the payment may be denied by the heirs after death, and the court would exclude the proof if offered by the bank, of such payment. The usages of the banking business entitle it to written evidence of money paid by it.

A general depositor of funds in a bank, having claimed that he deposited certain money, is not entitled in repayment to the particular kind of money deposited, unless in case of a special deposit. A depositor, however, when the deposit made by him is in current funds, at the time of repayment, may insist that he shall receive in return current funds. And this is held to be the case, although the funds deposited have in the meantime depreciated. Where deposits are made in depreciated funds and credit is given to the depositor in current funds, the depositor is entitled on withdrawal of the same from the bank, to be paid in funds which are current. The bank at the time of the transaction should note the fact in accepting

the funds that they were not current funds, if it desires to protect itself at the time of payment.

This subject is further discussed under chapter treating on Duties of Paying Teller.

§ 179. Bank may refuse payment of deposit when.

A bank may refuse to honor and pay out deposits on a check when defects appear upon the face of the check. If the bank questions the genuineness of the signature its duty is to at once give notice to the owner of the deposit that payment is withheld for that reason.

A bank may be deceived as to the genuineness of a signature, and refuse to pay a check where the signature is genuine, and when refusal is based upon that ground and with a motive to protect the deposit, or against fraudulent checks and signatures, the law would not hold the bank liable in damages.

A bank, before payment of a check, is entitled to time in which to examine its books, and ascertain from them whether the amount demanded by the check is then a balance due the depositor. This may require the examination by a clerk of all checks, drafts and other orders which may have been during the day, previously presented and charged to his account. The bank may take time to strike a balance from the books of the depositor's account, and, if in case of a run on the bank, a depositor presents his check which purports to be for the balance then due him; demanding that he be paid his balance in full; the bank is entitled to a sufficient time in which to balance the account of the depositor before payment of the check. This requires time in which to enter the checks and deposits for the day upon the books of the bank and the depositor's pass-book, and, when balanced, if the check as drawn, is for the correct amount of the balance, it must then be immediately paid. When a "run" is on against the bank, it is not required to call in or retain extra assistance for the purpose of rapidly facilitating such settlements to accommodate a customer, but it may proceed in its customary and ordinary way of doing business.

A bank must pay checks in the order in which they are presented. Where two or more paying tellers are employed, checks may be presented tó each paying teller simultaneously,

and to prevent confusion or preference in payment, the paying teller is entitled to time to examine the debits and credits of the depositor, and by so doing, the order of payment may be fixed.

The question of what is a reasonable time in which acceptance and payment should be made is one of fact to be determined by the court when brought into issue.

A check may be paid when presented, by giving the owner credit therefor upon his account, or it may be paid in money; or it may be paid by substituting a draft drawn upon some other banking institution, for the amount, or it may be turned into a certificate of deposit, made payable by the bank at some future date; or as stated, it may be paid by the cancellation or discharge of a debt owing by the depositor to the bank. When a check is surrendered and a substitution takes place, for example, when a draft or certificate of deposit is issued in a subsequent suit, if it should arise, the suit should be brought upon the new instrument.

A check in effect is also paid where a certification of it by the bank takes place. The check is immediately charged to the drawer's account and the bank becomes from that date, liable to the *bona fide* holder. The drawer is discharged and the bank at once becomes the debtor to such holder. When a certified check passes by endorsement to a *bona fide* indorser, the bank cannot set up error, but must pay. It cannot be revoked.

When a check is not dated it is sufficient to put the bank upon inquiry. The bank may refuse to pay an undated check and before payment require that the date be inserted, and it is held that the payee may insert the true date.

It is also claimed that an undated check is never payable, and a date written in *not the true date*, of the check is a material alteration of its terms such as would destroy its validity.[1]

Held that "whenever the legal rights and liabilities of a maker of commercial paper are changed, in a material respect, by fraudulent alteration of the obligation, such alteration vitiates the instrument and the question whether it is material or not is one of law for the court."[2]

[1] Crawford v. West Side Bank, 100 N. Y. 50.

[2] Crawford v. West Side Bank, 100 N. Y. 56, and cases cited.

A payment by the bank of a check where it is changed so that by such change the obligations are altered, makes the bank liable.

A banker may pay to a depositor his deposit, upon an oral order as previously stated, but in doing so it takes all the risk of the depositor repudiating the transaction, and death may also complicate the position; the representatives denying the payment, the burden of proof would then be on the bank to show that payment was made.

"It has been said that a depositor can demand his deposit without a written order."[3]

The bank may and frequently does pay on telegraphic instructions, and in doing so it is not liable to the sender if the message received does not conform in amount to the original. The sender may hold the company transmitting the message for error, but as between the bank and the owner of the deposit, it is not liable.

A person having a deposit in a bank and becoming insane, and during insanity issuing his check which is paid by the bank after knowledge of insanity, is not payment; *but if it pays in good faith*, without the knowledge of such insanity, it will be protected.[4]

Where the amount of money named in the check is written out in full and which differs from the amount specified by the figures, the writing prevails over the figures.

This subject is further treated in the chapter on checks.

§ 180. Payment of trust funds.

In the leading case of Hatch v. Johnson Loan and Trust Company, 79 Fed. Rep. 828, the court says:

"A bank cashier or teller may pay out a check of a corporation when it is drawn in the usual course of business; and there are no circumstances of suspicion to put him in inquiry without instituting a preliminary inquiry as to what is to be the destination of the money drawn before the check is honored.

[3] McEwin *v.* Davis, 39 Ind. 109; Ellis *v.* Woodsocker First Nat. Bank, 22 R. I. 565, 48 Atl. 936; Watts *v.* Christie, 11 Beav. 551; Cambridge First Nat. Bank *v.* Hall, 119 Ala. 64, 24 So. 526; Neff *v.* Green Co. Nat. Bank. 89 Mo. 581.

[4] Riley *v.* Albany Savings Bank, 36 Hun (N. Y.) 513.

The bank was bound to pay the check when drawn by the Company in the usual course of the company's business."

The opinion of the Supreme Court of the State of Illinois in the case of the State National Bank v. James Reilly, 124 Ill. 464, is in direct line with the doctrine laid down by the district judge in the Federal case above cited.

The rule is, *where a banker has knowledge of the fact that a breach of trust is going to be perpetrated upon the trust fund, and he participates in such fraud, the bank is liable for such misappropriation and the true owner can recover.*

Where a public officer, a United States postmaster, deposits money in a bank in his official capacity and executes his checks in such capacity and withdraws the funds applying them to his personal purposes, the bank would not be responsible "*unless it had actual or constructive knowledge of the unlawful intention and purpose of the postmaster when the checks were drawn or presented and paid.*"[5]

Where a bank has full knowledge of the trust, it must protect it to the extent of refusing the payment of checks where the funds are to be used to the loss and injury of the real owner.

Money deposited by the husband in his wife's name does not give him the authority to withdraw it. The fact that he deposited the money as an agent does not make him an agent to withdraw it; and he has no authority to execute checks in his wife's name, signing the same as agent.[6]

Deposits in all instances can be withdrawn by the real owner. It frequently occurs that deposits have been made by mistake and an "account opened" in the name of a person who is not the real owner of the funds. When the bank is fully satisfied that the account has been opened and credit given to the wrong person, it may of its own action, change the account and place the deposit to the credit and in the name of the real owner; but where the bank is ignorant of any mistake and a deposit has been made in the name of a party who, in fact, is not the owner or entitled thereto; and pays a check executed by the party shown by the books of the bank as the owner, the bank is not liable.

A deposit may be made by a person under age in his own

[5] United States *v.* Nat. Bank, 73 Fed. Rep. 379.

[6] Bates *v.* First Nat. Bank of Brockport, 89 N. Y. 286.

name, and he may execute checks and withdraw the same (unless a statute to the contrary intervenes), and the bank will be protected. But upon notice given to the bank by the parent or guardian that such funds are claimed, the bank may refuse payment of the minor's checks.

A bank may be estopped from the payment of a deposit by process of law, for example — the deposit may be attached or garnisheed. When the court issues a writ and the same is served upon the bank, the bank must respect and obey the notice and refuse to pay until the proceedings are determined.

The death of a depositor, when known by the bank, estops the bank from payment of checks though delivered to the payee by the maker thereof prior to death.

The rule is, *that the death transfers the deposit to his personal representatives, and a bank, having the knowledge of the death and which afterward pays checks, does so at its peril.*

The statutes of some States, however, provide that the personal representatives may draw upon the account of the deceased in a certain sum before letters of administration are granted.

The bank is also estopped from making payment after notice of insolvency and assignment by the depositor. The assignment transfers the deposit to the assignee for the benefit of all the creditors.

If the bank honors the check before notice to it of assignment, it is protected.

Where the bank has a claim or debt due it from the depositor, it may set off the deposit (if done before the death of the maker) as against such debt, and this operation acts as a withdrawal of the deposit.

The deposit must belong to the debtor in his own right. The bank cannot apply trust funds in this way, and even after the application is made, if it is shown that the deposit belonged to someone else, the court will order the bank to return the same to the rightful owner.

Where a debt is secured, the bank has no authority to apply the deposit in payment of such a debt. Also after notice of death, a bank has no right to apply the deposit standing in the name of the deceased, to the payment of his debt though the debt be due and acknowledged.

CHAPTER XXI.

CHECKS.

§ 181. Defined.

Bouvier's Law Dictionary defines a check to be:

"A written order or request addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named, or bearer, or to such person, or order, a named sum of money."

Norton on Bills and Notes, defines a check as follows:

"A check is a draft or order on a bank or banker, purporting to be drawn on a deposit of funds, for the payment, at all events, of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand."

There is no essential difference in the definition. Bouvier defines it to be a written order or request addressed to a bank or banker by a party having money in their hands, requesting them to pay on presentment, to a person named, or bearer, a fixed sum of money.

A form of the written instrument commonly used is in the words and figures as follows:

No. .... "Pasadena, California, Jan. 1st, 1906.

SAN GABRIEL VALLEY BANK.

Pay to the order of Robert J. Burdett $100,000.00

One Hundred Thousand Dollars."

"Frank C. Bolt."

The form of the check presents a very accurate definition. It is a written instrument dated, addressed to a bank, directing it to pay to a person named therein or to his order (or bearer), a fixed sum of money, and is signed by the drawer.

The requisites of a check, are that it shall be, first, dated, second, it must be drawn on a bank; third, it must be payable to a person named to order (or bearer); fourth, it must specify a certain sum of money to be paid; fifth, it must be signed by the drawer.

If it is defective in any one of these requisites, it is an imperfect instrument and may be refused when presented to the bank for payment.

A check, being an order on a bank to pay a certain sum of money, is a direction to the bank to charge the drawer's account with the sum named therein.

§ 182. A check must be dated.

If a check has no date, it has no definite time for payment. A check is only payable on the day of its date or on a day a future date, or at the time of presentment subsequent to its date. The bank, therefore, if a check is not dated has no direction when to pay or charge the drawer's account; but a bank may pay a check without risk and without a date when presented by and payable to the drawer himself. A bank may pay to a customer his deposit in full, at any time without direction or authority in writing from the depositor, upon the ground that the bank can select its customers, receive deposits and repay them at any time. Therefore, it may close the account with the depositor by payment in lawful funds at any time without being requested to do so; and a check in such a case, is not required as an evidence of authority. But the bank cannot charge the depositor's account with a sum of money, which sum is to be paid to or transferred to the account of another, without direction or authority in writing; and this authority must be dated and signed by the party to be charged.

The date is important, as stated, because it fixes accurately the time in which payment may be demanded. It is not due until a date is fixed. If it fails to bear a date, the bank is at once put upon inquiry and may refuse payment upon the special ground that the check not being dated, no time of payment is fixed.

Checks are either payable on demand or at a date fixed in the future.

In the case of Crawford v. Westside Bank, 2 N. E. 881, the court says:

"In the present case, the plaintiff, on the twentieth of April, intending to be absent from his place of business for a few days, drew his check on the defendant, dated April 22d, for $700, payable to his clerk, one Morgan, for the purpose of enabling

him to obtain funds to pay wages becoming due to the drawer's employees on the 22d. The check was left in the drawer's check-book, in his safe, with directions to Morgan, who had a key to the safe, to take the check on the 22d, draw the money, and deliver it to his foreman to pay out to the employees in case the drawer did not return before noon upon that day. The plaintiff did not return until after the time appointed; but on the 21st, Morgan took the check, and, having altered the date to the 21st, drew the money from the bank, and absconded with the funds on the same day.

"The check, as drawn, conferred no authority on the bank to pay the amount for which it was drawn out of the plaintiff's funds before its date.[1]

"Such payment did not, therefore, justify the bank in charging the check to the plaintiff. The bank, undoubtedly, had the same right as any other person to purchase a post-dated check, and enforce payment, however, depended upon the question as to whether the purchaser became a *bona fide* holder of the paper, and also whether it was then a valid obligation of the maker. A material alteration of its terms, after execution and before payment, would destroy its validity. *A change in its date, whereby the time of its payment was accelerated was undoubtedly such an alteration.*

"Thus, it was held, in the case of Vance v. Lowther, 1 Exch. Div. 176, where the date of a check had been altered from March 2d to March 26th, and, as thus altered, was attempted to be enforced against the drawer by one who had paid value to an unlawful holder for it, that such alteration vitiated the check, and no recovery could be had thereon."

The fact that a check is not dated or that the date is changed as stated, would put the bank on inquiry, and it has been held that an undated check is never payable.

§ 183. It must be drawn on bank.

The Supreme Court of the United States, in distinguishing a check with a bill of exchange, says that a check is always drawn on a bank or banker; while a bill of exchange is not.

[1] Godin *v.* Bank of the Commonwealth, 6 Duer, 76; Mohawk Bank *v.* Broderick, 10 Wend. 304; S. C. 13 Wend. 133.

It is always necessary that the drawee be designated as a banker, so that the instrument will not be construed as a bill of exchange.

The Supreme Court of the United States, in defining the difference says:

"The chief differences are, that a check is always drawn on a bank or a banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the Statute of Limitations runs only from that time. It is, by its face, the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer.

"It is not necessary that the drawer of the bill should have funds in the hands of the drawee. A check, in such a case, would be a fraud."

The court further says that a check is never presented for acceptance but only for payment.

§ 184. Check must be payable to a person named or to his order or to bearer.

A check failing to designate a payee, or to designate him with sufficient certainty, it is claimed, will render the check void.

A check payable to a person named is a negotiable instrument and may be transferred simply by the payee indorsing his name on the back or on the face of the check.

It is held, that where a check is drawn payable to a fictitious person or to a name or figure, as for example "1905" or a word "rent" is in law regarded as payable to bearer, and is transferable on delivery.

§ 185. A check must be for the payment of a certain sum of money.

Daniels on Negotiable Instruments, 3d Edition, § 1570, says, "In this respect it does not differ from other negotiable instruments, and though perhaps it still might be termed a check, although not paid in money, by which is meant the legal tender currency of the country, it would certainly not be nego-

tiable if expressed to be payable in 'bank bills,' or 'in currency,' or if it lacked words of negotiability, or were deficient in any of the characteristics in respect to certainty in fact and time of payment and party to whom payment is to be made."

In the case of Bank of Mobile v. Brown, 42 Ala. 108, where an action is on a bank check by the indorsee against the drawer, it is held by the court, that a bank check payable in Confederate currency is not an instrument payable in money.

§ 186. A check must be signed by the drawer.

The place of the signature is immaterial, provided it appears to have been intended as a signature. It may be written in pencil. Or it may be printed or stamped. Or it may be the drawer's mark. In which case, however, when executed by the maker by mark, it should be executed in the presence of an officer of the bank, or witnessed by a person who could, if called upon by the bank, verify the check.

Coupons of bonds may be signed by the printed facsimile of the maker's autograph adopted by him for that purpose, though not expressly authorized by statute.

The State Treasurer of the State of Calfornia refused to pay the interest on certain bonds, alleging that the signature of the party entitled to collect the same, had been printed upon the coupon and not written with his own hand. The court mandamused the treasurer, and he was compelled to pay.[2]

The place of the signature upon the check is properly at the bottom and below the written order to pay; but the place of the signature is immaterial, provided it appears to have been intended as a signature.

§ 187. Days of grace.

The bank, upon presentment of a check, must pay the same upon demand, and cannot claim days of grace. No days of grace are allowed upon checks.

A bill of exchange drawn on a bank entitles it to days of grace, and the bank may claim this time and is not liable to an action for non-payment until the expiration of the time; but a check must be paid when presented. This rule cannot well be changed. It would retard the progress of business and ex-

[2] Pennington v. Baehr, 48 Cal. 565, 28 Ind. 18; 6 Hill (N. Y.) 443.

changes to establish a custom allowing banks a fixed number of days in which payments could be made on checks.

The refusal of a bank to pay a check when presented gives the drawer a right of action, in case he has funds in the bank to meet the checks.[3]

§ 188. Checks negotiable when.

A check is a negotiable instrument under the law unless by its written terms, it is made non-negotiable. A check payable on a contingency is not negotiable.[4]

§ 189. Delay in presentment.

A delay in presenting a check for payment will not discharge the drawer from his obligation on the check unless it is shown that he was prejudiced thereby.[5]

It must be presented within a reasonable time. If the holder fails to present it within a reasonable time and the bank becomes insolvent, the drawer will be discharged.

§ 190. What is a reasonable time.

The rule is, that where the payee or holder is in the same town where the bank is located, the check should be presented the next secular day after it is received and during banking hours.

In the case of Russell K. Bickford v. The First National Bank of Chicago, 42 Ill. 238, it is held that in order to fix the liability of the drawer of a check in case of non-payment, the holder should present the check to the bank on which it is drawn within business hours of the day next succeeding the receipt of the paper and give notice of the dishonor to the drawer.

In the case of Smith *v.* Miller, 43 N. Y. 171, Held, that the check could be operative as payment only by express agreement; but that although as between the drawee and payee, the payee was not bound to present the check until the day after its receipt by him; yet, that between the drawer and payee, it was the duty of the payee to present the check at

[3] Brooks *v.* Tradesman's Nat. Bank, 22 N. Y. St. 633.

[4] Little *v.* Bank, 2 Hill (N. Y.) 425.

[5] Bull *v.* Bank, 123 U. S. 105.

once and he was guilty of laches in not so doing and was chargeable with consequent loss.

In the case of Hamilton v. Lumber Company, 95 Mich. 436, the court says:

"It was held in Holmes v. Roe, 62 Mich. 199, that where the person receiving the check, and the banker on whom it is drawn, are in the same place, in the absence of special circumstances it must be presented for payment the same day, or, at latest, the day after, it is received; but if in different places, the check must be forwarded for presentment on the day after it is received, at the latest. It is also well settled that where the drawer has been discharged by the laches of the holder, and that fact appears, there must, in order to render the drawer liable, be clear proof that the promise was made with full knowledge of all the facts and circumstances." [6]

§ 191. Diligence to bind the indorser.

Where a check is drawn on a bank located at a distant place, the rule is, that the check must be mailed to that place for collection during business hours of the next secular day after its receipt, and the person charged with its collection must present it during business hours of the next secular day after its receipt.

In case of the Northwestern Coal Company v. Bowman and Company, 69 Iowa, 150, the court holds that this rule, however, may be varied by the particular circumstances of the case. The presentment, however, must be made in every case, with all the dispatch and diligence consistent with the transaction of other commercial concerns.[7]

§ 192. Stale checks.

A bank is bound to honor and pay a check when not barred by the Statute of Limitations. If a check is not presented within a reasonable time, where the drawer, the payee and the

6 Edw. Bills & N., 652–654; 2 Daniel, Neg. Inst., 1149; Wade, Notice, 974; Parsons v. Dickinson, 23 Mich. 56; Miller v. Hackley, 5 Johns. 375.

7 Mohawk Bank v. Broderick, 10 Wend. 304; Middletown Bank v. Morris, 28 Barb. 616; Smith v. Janes, 20 Wend. 192; Burkhalter v. Second Nat. Bank, 42 N. Y. 538; Griffin v. Kemp, 46 Ind. 172–176; Woodruff v. Plant, 41 Conn. 344; Werk v. Madriner Valley Bank 8 Ohio St. 302.

bank are all in the same place, the bank will naturally look upon such a failure to present the check, with suspicion, and it is sufficient cause to put the bank upon inquiry, and if, failing to make a proper inquiry, it pays the check at its peril.

In the case of Bull v. Bank of Kasson, 123 U. S. 105, the court holds that a bank check presented by a *bona fide* indorsee for payment six months after its date, the funds against which it was drawn remaining in the hands of the drawee, and the drawer having been in no way injured or prejudiced by the delay, is not overdue so as to be subject to equities of the drawer against a previous holder.

§ 193. Holder of check rights against bank.

The weight of authority is, that the payee of a check, before it is accepted by the bank, cannot maintain an action upon it against the latter, as there is no privity of contract between them. The holder's remedy is against the drawer. The bank's liability, if any, is to the drawer.

This question is fully and elaborately discussed in the case of First National Bank of Washington v. Whitman, 94 U. S. 343, and is of such importance as to here justify the giving of the opinion of the court in full.

The facts are stated in the opinion of the court:

"*Opinion.* This action is brought against the First National Bank of Washington to recover the amount of a check drawn upon it by Mr. Spinner, Treasurer of the United States, for $3,414, dated March 9, 1867. The check is in this form, viz.:

"Draft No. 9,243 on War Warrant No. 915.

"($3,414.)

"TREASURY OF THE UNITED STATES,
"WASHINGTON, *March* 9, 1867.

"Pay to the order of Mrs. E. S. Kimbo, three thousand three hundred and fourteen dollars. No. 9,243. Registered March 9, 1867.

"Issued on requisition No. ———. $3,414.

"S. B. COLBY,
"Register of the Treasury.
"F. E. SPINNER,
"Treasurer of the U. S.

"To the First National Bank of Washington, D. C."

"It was indorsed in the name of Mrs. Kimbro without authority, and the amount of it was paid by the bank to an unauthorized holder. It appears from the testimony of Mr. Tayler, first Comptrolller of the Treasury, that the funds of the Government deposited by the Treasurer in a national bank, are treated by the Government, for the purposes of keeping accounts, as in the Treasurer's own charge and custody; that they are charged to him, and that payments made are credited to him, and that he is chargeable precisely as if the funds had been in his own office, and that he had power to make the check in question.

"We may, therefore, simplify the case by eliminating from its consideration, all reference to the United States, and consider the transaction as between Mr. Spinner, as an individual, and the bank, as his depository, and Mrs. Kimbro, as the payee of his check.

"The question is this: Can the payee of a check, whose indorsement has been forged or made without authority, and when payment has been made by the bank on which it was drawn, upon such unauthorized indorsement, maintain a suit against the bank to recover the amount of the check? We think it is clear, both upon principle and authority, that the payee of a check unaccepted cannot maintain an action upon it against the bank on which it is drawn. The careful and well-reasoned opinion of Mr. Justice Davis in delivering the judgment of this court in Bank of the Republic v. Millard, 10 Wall. 152, leaves little to add upon this subject by way of illustration or authority. In that case a paymaster of the army made his check on the Bank of the Republic to the order of Captain Millard for $859, due to him for arrears of pay as an officer of the army. The bank paid the amount of the check upon a forged indorsement of Millard's name. Recovering the check and exposing the forgery, Millard demanded payment to himself, and, upon refusal, brought his action against the bank. This court held that the action could not be maintained, upon the principle that there was no privity between the bank and Millard. The bank's contract was with the paymaster only, and to him only was its duty. It received no money from Millard. It never promised Mil-

lard to pay him any money. It had no money belonging to him. It received money from the paymaster, upon an agreement that it would return it to him when called for by him in person, or that it would pay it upon his checks. But it made no such agreement, or any agreement, with Millard. For a failure of duty in this respect, it was responsible to the paymaster, with whom it made the contract, and to no one else. If the check was not paid, the arrears of pay to Millard were not paid, and his claim upon the Government or the paymaster was not impaired by the giving of the check, which, being presented in due time, was not paid. He was still entitled to demand his arrears.

"That case is a perfect and complete authority upon the question stated. See also Aetna National Bank v. Bank, 46 N. Y. 82.

"Nor is this principle confined to checks or bills. Thus, in Ashley v. Dixon, 48 N. Y. 430, it was held that if 'A.' be under a contract to sell property to 'B.,' and 'C.' persuade 'A.' to sell the property to him, no action lies by 'B.' against 'C.' There is no privity of contract between 'C.' and 'B.,' but the remedy of the latter is against 'A.' only.

"It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case, it stands to the holder in the position of a drawer and acceptor of a bill of exchange.[8]

"It may accomplish the same result by writing upon it the word 'good,' or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check, and that it will so apply them.[9]

"And such certificate, it is said, discharges the drawer. As to him it amounts to a payment.[10]

"Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance.

[8] Merchants' Bank *v.* State Bank, 10 Wall. 604; Epsy *v.* Bank of Cincinnati, 18 id. 604.

[9] Cook *v.* State Bank of Boston, 52 N. Y. 96.

[10] Bank *v.* Leach, 52 N. Y. 350; Meads *v.* Merchants' Bank, 25 id. 143, 9 Met. 311, 2 Duer, 121.

It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee.

"It is said that this fact of a contract between the payee and drawee exists in the present case. The testimony of Mr. Arnold is referred to, to the effect that in April, 1867, the bank made its weekly statements to Mr. Spinner of deposits received and payments made, returning the draft of Mrs. Kimbro as paid on the 22nd of that month, and that in the statement the amount of the draft was entered to the credit of the bank.

"There is no suggestion in the evidence that either the bank or Mr. Spinner knew that the indorsement of the payee was unauthorized. The bank, we assume, would not knowingly subject itself to the dangers and liabilities resulting from making payment to one not authorized to receive it. We assume, also, as we are bound in justice to it to do, that it would not ask Mr. Spinner to give credit for a payment that it knew to have been illegally made, and that it would not attempt to deceive him into the belief that a pretended indorsement was a real one. It comes to this, that, upon a settlement of accounts between them, a credit was by mistake allowed to the bank to which it was not entitled. The law is, that neither party is to be benefited or to be injured by the mistake. The bank must refund the amount by handing over the sum, or by crediting the same to Mr. Spinner in his next account. Mistakes in bank accounts are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credit for sums deposited. When discovered, the mistake must be rectified, and an ordinary writing up of a bank book, with a return of vouchers or a statement of accounts, precludes no one from ascertaining the truth and claiming its benefits.[11]

"We cannot perceive that such a mistaken recognition of

11 Story, Eq. Pl., §§ 799-801; Story, Eq. Jur., §§ 523, 527; Buchlin *v.* Chaplin, 1 Lans. 443; Bruen *v.* Hone, 2 Barb. 586; Bullock *v.* Boyd, 2 Edw. 292.

the validity of the payment of this check can create an additional or different contract between the bank and the owner of the draft.

"It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it had paid the check; but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawer; and in law the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before.

"We cannot recognize the argument that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent.

"Without discussing the other questions argued, we are of the opinion, for the reasons given, that the plaintiff below was not entitled to recover."

Where a bank certifies a check, it is equivalent to a declaration upon the part of the bank that the maker has the funds deposited with the bank and to his credit to pay the same.

Immediately upon the certification of a check by the bank the maker's account should be charged with the amount of the check, and the bank at once charges itself with the amount

and places the same to the "certified check account." Thereupon, it becomes an unconditional promise by the bank to pay the check to the payee named therein or to the *bona fide* owner.

The rule then is, that the legal holder upon failure of the bank to pay, may enforce payment in an action directly against the bank.[12]

A certificate of deposit issued by a bank is very much like a certified check. It is equivalent to a certification that the bank has received the amount named therein, and it agrees to pay the same to the *bona fide* owner thereof on presentment, and a failure of the bank to pay, the holder may enforce payment in an action against the bank.

§ 194. Certified checks.

A certified check is in form, the same as an ordinary check drawn upon the bank, and when presented for certification, the officer of the bank having authority to certify checks, stamps or marks across the face of the check, the word "good," signing his name thereto and writing the date of certification.

All banking corporations conducting a commercial or savings bank business, and authorized to issue or pay checks upon accounts, may certify any check drawn upon the association, if the drawer of said check has an amount of money equal to the amount specified in such check in the bank.

The Revised Statutes of the United States, section 5208, provides:

"It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent, of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."

12 Florence Mining Co. *v.* Brown, 124 U. S. 385.

In the discussion by the court of the foregoing section of the statute, in the case of Thompson *et al.* as executors, etc., Appellants v. The St. Nicholas National Bank, Respondent, 113 N. Y. 325, the court says:

"It will be seen that the statute affirms the legality of the contract of certification, and expressly prescribes the consequences which shall follow its violation. It, therefore, appears that, so far from making the contract of certification void and illegal, its validity is expressly affirmed, and the consequences which follow a violation are specially defined, and impliedly limit the penalty incurred to a forfeiture of the bank's charter and the winding up of its affairs. There is a clear implication from this provision that no other consequences are intended to follow a violation of the statute. It would, indeed, defeat the very policy of an act intended to promote the security and strength of the national banking system, if its provisions should be so construed as to inflict a loss upon them, and a consequent impairment of their financial responsibility.

"The decisions of the Supreme Court of the United States are uniform in giving this construction to the provisions of the National Banking Act." [13]

The above case was appealed from the Court of Appeals of the State of New York and heard by the Supreme Court of the United States at its October term, 1892. Mr. Justice Blatchford, in delivering the opinion of the court, says:

"In addition to that, the statute expressly provides that a check certified by a duly authorized officer of the bank, when the customer has not on deposit an amount of money equal to the amount specified in the check certified, shall nevertheless be a good and valid obligation against the bank; and there is nothing in the statute which, expressly or by implication, prohibits the bank from taking security for the protection of its stockholders against the debt thus created. There is no prohibition against a contract by the bank for security for a debt which the statute contemplates as likely to come into existence, although the unlawful act of the officer of the bank in certifying may aid in creating the debt. In order to adjudge a con-

[13] National Bank of Xenia *v.* Stewart, 107 U. S. 676; National Bank *v.* Matthews, 98 id. 621; National Bank *v.* Whitney, 103 id. 99.

tract unlawful, as prohibited by a statute, the prohibition must be found in the statute. The subjection of the bank to the penalty prescribed by the statute for its violation cannot operate to destroy the security for the debt created by the forbidden certification. * * *

"This construction of the statute in question is strengthened by the subsequent enactment, on July 12, 1882, of section 13 of the act of that date, chapter 288, 22 Stat. 166, making it a criminal offence in an officer, clerk or agent of a national bank to violate the provisions of the act of March 3, 1869. This shows that Congress only intended to impose, as penalties for over-certifying checks, a forfeiture of the franchises of the bank and a punishment of the delinquent officer or clerk, and did not intend to invalidate commercial transactions connected with forbidden certifications. * * *

"Moreover, it has been held repeatedly by this court that where the provisions of the National Banking Act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties."[14]

The penalty for illegal issue of certified checks will be found in the Act passed by Congress and approved July 12, 1882. Section 13 of said act fixing the penalty is as follows:

"That any officer, clerk, or agent of any national banking association who shall willfully violate the provisions of an act entitled, 'An act in reference to certifying checks by national banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any circuit or district court of the United States be fined not more than five thousand dollars, or shall be

[14] National Bank *v.* Whitney, 103 U. S. 99; National Bank *v.* Matthews, 98 id. 621; National Bank of Xenia *v.* Stewart, 107 id. 676.

imprisoned not more than five years, or both in the discretion of the court."

§ 195. Right of holder to look to both the acceptor and the drawer of a certified check.

The Supreme Court of the State of Illinois in the case of Bickford v. First National Bank of Chicago, 42 Ill. 238, declares that the holder of a certified check has the right to hold the drawee and acceptor as well as the drawer. That where the acceptor has failed and made an assignment, the holder waives none of his rights against the drawer by giving notice to the assignee of the acceptor not to pay over any money to the drawer out of assets which might come to his hands in that capacity.

The court says:

"Certifying a check to be 'good' is nothing more than a promise by the bank to pay it when presented, as in the case of the acceptance of a bill of exchange. Now, in the latter case, what are the rights and duties of the parties? If the bill is accepted by the drawee and protested for nonpayment and the drawer duly notified thereof, the law is well settled that he is bound to pay the bill with damages and costs. The same is the law in regard to a certified check. Barnett v. Smith, 10 Foster (N. H.) 206. In Willets v. The Phoenix Bank, 2 Duer. 121, it was held that certifying a check to be 'good' meant not only that it was good when certified, but that it shall be good when presented for payment. If this was not so, the act of certifying would be nugatory and amount to a fraud."

§ 196. Drawer of certified check when released.

Where the drawer of a check makes and delivers the same to the holder and he procures a certification by the bank, the drawer is released. By his own act he makes the bank his debtor. In the case of Born v. The First National Bank of Indianapolis, 123 Ind. 78, the court says:

"We agree with the appellant's counsel that the drawer of a check is released if the holder instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. If the holder elects to procure the certification of the check, it becomes in his hands substantially a cer-

tificate of deposit. By his own act he makes the bank his debtor and releases the drawer of the check. The reason for this rule is, that the moment the check is certified, the funds cease to be under the control of the original depositor and pass under the control of the person who procures the certification of the check drawn in his favor. First National Bank v. Leach, 52 N. Y. 350; Thomas v. Bank, 82 N. Y. 1; Girard v. Bank of Pennsylvania, T. P., 39 Pa. St. 92; Freund v. Importers', etc., Bank, 76 N. Y. 352."

And the court in this connection states:

"It is true that the bank by which the check is certified becomes bound for its payment, and that it cannot defeat the right of the holder upon the ground that the drawer has no funds on deposit. Espy v. Bank of Cincinnati, 18 Wall. 604."[15]

It is held in the case of Riverside Bank v. First National Bank of Shenandoah, 74 Fed. Rep. 276, that the certification by a bank of a check made payable by such bank where the drawer keeps an account, is an absolute promise by the bank to pay such check, not as the debt of another but as its own obligation. This entitles the holder of the check to suspend any remedy against the maker and relax steps to charge an indorser, and cannot be rescinded by the bank because made under a misapprehension of fact as to the efficiency of the maker's account to meet the check.

Where "A" purchases a certified check payable to order and obtains title without indorsement by the payee, he holds it subject to all equities and defenses existing between the original parties, although he may have paid a full consideration without notice.[16]

§ 197. A bill of exchange may be accepted orally.

Where the statute of a State does not provide that an acceptance of a bill of exchange or check shall be made in writing, a verbal acceptance, when proven, is good.

The court, in the case of Jarvis v. Wilson, 46 Conn. 90, says that the Statute of Frauds does not apply to such an undertaking, and gives as a reason, that the acceptor is regarded as

[15] The Irving Bank v. Wetherald, 36 N. Y. 335; Drover's Nat. Bank v. Provision Co., 117 Ill. 100.

[16] Goshen Nat. Bank, Appellant, v. Bingham, Respondent, 118 N. Y. 349; Lynch v. First Nat. Bank of Jersey City, 107 id. 179.

the primary debtor and his acceptance is an undertaking not merely to pay a debt due from the drawer to the payee, but to pay his own debt to the drawer.

The courts say that it is fully settled, both in England and in the United States, that in the absence of a statute, an oral acceptance of a bill of exchange will bind the acceptor.[17]

§ 198. Liability of banks — Negligence.

In the case of Peter Helwege v. Hibernia National Bank, 28 La. Ann. 520, it is held that where a bank certified a check failing to use proper caution, allowing the check to pass from its hands after certification drawn in such a manner that the amount could be easily raised without suspicion, that in the hands of a *bona fide* owner for value, it had no defense.

The court says:

"The bank was negligent in certifying the check without drawing a line with a pen across the blank between the words forty-one and dollars, thereby enabling the drawer to perpetrate the fraud. The evidence is, there was nothing in the appearance of the check to excite the suspicion of the plaintiff or a prudent man in business."

§ 199. When mistake in certification may be corrected by a bank.

Where a bank, through a mistake, has certified a check for an amount greater than the drawer has on deposit, it may, after discovering the mistake and after the delivery of the check to the holder, upon getting temporary possession, cancel and make the certification of no effect as between the holder and the bank, provided no rights of other parties have intervened and the situation or rights of the holder between the certification of a check and its cancellation has in no way changed.

§ 200. Who may certify checks.

The president and cashier of a bank have the inherent power to certify checks. The assistant cashier, paying and receiving tellers may do so when duly authorized by the board of directors.

17 Dunovan *v.* Flinn, 118 Mass. 539; Spaulding *v.* Andrews, 48 Pa. (S. R.) 411; 1 Parsons on Contracts, 267; Fisher *v.* Beckwith, 19 Vt. 31; Ward *v.* Allen, 2 Met. 53; Exchange Bank *v.* Rice, 98 Mass. 288.

Where there is no authority for the act, a general or particular usage in a given direction will bind the bank to respond to a third party who deals with it in good faith.

The general rule is, that where a subordinate officer or clerk of a bank performs any act out of the mere ordinary routine of banking business, that in order to bind the bank, his authority to act must be shown.

Where a subordinate officer or clerk has been permitted to pursue a particular practice in certifying checks for customers or otherwise, his acts although wrongful, will bind the bank in favor of a person who fullfils the conditions of a dealer in good faith.[18]

§ 201. When bank estopped from denying a forged certification.

"Where a forged certification of a check is presented at the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification and the bank is bound by it the same as if it was genuine." [19]

§ 202. Bank can correct mistake when.

Where a bank certifies a check by mistake, it may correct the same by immediately notifying the holder and before the check has passed from his hands to the hands of a *bona fide* owner.[20]

§ 203. Memorandum checks.

Memorandum checks or checks marked as such by the drawer by writing on the face of the check "memo" or "memorandum," has no significance relating to the duties of the bank when presented for payment. They are treated as all other checks, and when presented by the payee they must be paid. The words "memo" or "memorandum" written on the face of a check, as between the drawer and the payee, may signify and denote a contract of some nature existing between them; but the words as stated have no significance to the bank.

18 Farmers & M. Bank *v.* Butcher's & Drover's Bank, 16 N. Y. 125.

19 Continental Nat. Bank *v.* The Nat. Bank of the Commonwealth, 50 N. Y. 575; Clews et al. *v.* Bank of New York Nat. Banking Assoc., 20 N. W. 852.

20 The Irving Bank *v.* Wetherald, 36 N. Y. 335; Brooklyn Trust Co. *v.* Toler, 65 Hun, 187.

If there is an agreement existing between the drawer and payee, for example, that the check will not be presented at the bank immediately for payment, the only remedy the drawer may have, is one direct against the payee.

Where a check drawn in favor of one who had lent money to the drawer, on the bank where the drawer was known to have no funds and where such check was marked as a memorandum check and which was not expected to be presented to the bank. Held:

"With respect to the check, considering the circumstances under which it was received, both parties knowing that there were no funds in the bank, and it not being intended to be presented there, we think it may be well considered as evidence of money borrowed and recoverable on one of the money counts."

In the case of Jacob Skillman v. Liscomb R. Titus, 3 (Vroom.) N. J. Rep. 96, where an action was brought on an ordinary bank check drawn payable to "A," "B," or bearer and is indorsed by the holder to a third person for a valuable consideration, and it appears that at the time of indorsement the abbreviation "mem" was on the face of the check, and that two years and a half had elapsed since it was drawn, the circumstances indicated that the check was not given in the usual course of business, and were sufficient to put the indorsee upon inquiry; and if, for want of proper inquiry, he suffers loss, he has no ground of complaint against the drawer of the check.[21]

§ 204. Post-dated checks.

A post-dated check is one drawn in the ordinary form, but bears a future date and is payable on or at any time after its date.

If a bank pays a post-dated check before the day of its maturity, it does so entirely at its own risk.

The evident object of the drawer of such a check is to extend the time of payment to a time when he may provide the money to pay the same, and if a bank pays such a check before its maturity and charges the same to the account of the drawer, and dishonors and refuses to pay another check of the drawer not post-dated but intended by the drawer to be paid out of his

[21] Dykers v. Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

ordinary account, the bank becomes liable to the drawer to the extent of any damages caused by such act.

The drawer's check is not an order of direction to the bank to pay the same until the day of its maturity.

A post-dated check, like all other checks, is not entitled to days of grace.

The law defining and governing post-dated checks is so clearly given in the case of Champion v. Gordon, 70 Pa. St. 474, the opinion of the court is given in full:

"The law merchant recognizes clearly a distinction in many respects between checks on banks and ordinary bills of exchange. One difference is, that when the former are payable on demand or at sight, no days of grace are allowed. The same rule holds when they are post-dated. Byles on Bills, 14, note; 3 Kent's Com. 104, note; *In re* Brown, 2 Story's Rep. 502; Daniel v. Kyle, 1 Kelly (Md.) 304; Mohawk Bank v. Broderick, 10 Wend. 304; Salter v. Burt, 20 Wend. 205; Andrew v. Blackly, 11 Ohio (N. S.) 89; Westminster Bank v. Wheaton, 4 R. I. 30. Whether it applies also to checks payable at a future day named, is a question upon which there is a contrariety of opinion and decision. Mr. Justice Story says: "The argument pressed is that checks are always and properly payable on demand, and that when payable at a future time they become, to all intents and purposes, inland bills of exchange. But I am not, by any means, prepared to admit the validity or force of this distinction; and no case has been cited which, in my judgment, satisfactorily establishes it. A check is not less a check because it is post-dated, and thereby becomes in effect payable at a future and different time from that on which it is drawn or issued. This is sufficiently apparent from the case of Allen v. Keerers, 1 East. 435." That was the determination of a question arising under the Stamp Acts, and it was there held that a post-dated check was not a draft payable on demand, but at a future day, and therefore liable to the duty.

Judge Story adds: "It (a check) is usually also made payable on demand, although I am not aware that this is an essential requisite. The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are (as it seems to me) that they are always drawn upon a bank or banker; that

they are payable immediately on presentment, without the allowance of any days of grace, and that they are never presentable for mere acceptance, but only for payment." 2 Story's Rep. 512. He quotes Chancellor Kent as concurring in these views. 3 Kent, 104, n.

The ordinary commercial form of a bill of exchange, payable at a future day, is at so many days' or months' notice after date or sight. An order so drawn, whether upon a banker or any other person, ought to be regarded as a bill with all the privileges and liabilities which by the law merchant are incident to a bill. The drawer, by adopting this usual form, must be held so to intend. So, if an order be drawn on a merchant or other person not a banker, with whom the drawer keeps money on deposit subject to draft, payable at a future day named, there exists no reason why the same rule should not apply. But there is a good reason why there should be a difference between an order so drawn upon a banker, which certainly must be presumed to be by a person who keeps money on deposit with such banker, subject to draft, and an order on a merchant or other person. If such an order drawn upon a bank, payable at a future day named in it, must be considered as an inland bill of exchange, and not a check, then the payee or holder has the right to present it at once for acceptance, protest it at once for non-acceptance, and sue the drawer immediately. Should it be accepted, however, the funds of the drawer in the bank would necessarily be thereby tied up until the day of payment. All the objects of directing payment at a future day would thus be frustrated. What the drawer undertakes is, that on a day named he will have the amount of the check to his credit in the bank. In the meantime he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future day. Why then is a check expressly so made payable to stand on different ground?

In the case before us an ordinary printed form of a bank check was evidently used, and the day of presentment written in one of the blanks. This is the most convenient form, for it calls the attention of the cashier or paying teller to the fact which he would be likely to overlook if it were expressed only by the date. Nothing, I am told, is more common than such

mistakes in the payment of post-dated checks, and depositors often thus find their account overdrawn, very much to their embarrassment. If we determine that an order like that before us is not presentable for acceptance before maturity, we settle the question. It is a check and not a bill of exchange. More than twenty years ago the banks of Philadelphia, under the advice of their counsel, adopted this rule, and it has been their uniform practice ever since. The usage of the banks in the commercial metropolis of the State ought to have great weight in determining a question of this character. It is perhaps quite as important that such usage should not be disturbed, as that the point should be decided abstractly or theoretically right. It was so held in 1866 in the District Court of Philadelphia, in Lawson v. Richards, 6 Pa. Rep. 179, a case in which the most eminent counsel at the bar were concerned for the defendant, and that determination was acquiesced in."

§ 205. Bank bound to honor checks, when.

A bank is under obligation to honor checks and drafts when presented against all general deposits, where a balance is due from the bank to the depositor covering the amount named and called for by the check. If the check is drawn for a sum greater than such balance, the bank may refuse to pay the check and may demand that the check be drawn for an amount not to exceed the balance due the depositor.

A bank is held liable and bound to pay *in accordance with the depositor's orders in writing*, when there is a balance to his credit sufficient for that purpose.[22]

The Illinois court says that where "the depositor has directed a payment to be in a certain manner, a payment made otherwise than according to his directions is no discharge of the bank's obligations towards him." The order, however, must be one that the bank can, in the course of its business, comply with. An unreasonable order which might require the bank to deliver the money to some one not present at the bank's counter would be unusual and not of a nature demanding a compliance.

A deposit, as stated, made in current funds must be paid in

22 Watson *v.* Phœnix Bank, 8 Met. (Mass.) 217; First Nat. Bank *v.* Pease, 68 Ill. (App.) 562.

current funds. A deposit made in silver, and entered as such by the bank at the time, may be paid in silver. The bank may pay in "kind" and nothing more can be required of it. The conditions have been complied with when the depositor receives in "kind" the money he deposited.

A bank knowing that a check is void and pays the same, does so at its peril. For example: Where, by the statute, the property of a deceased person can only be taken possession of by an administrator appointed by the court, and, before such transfer is made, a check drawn by the deceased before death is presented to the bank for payment, and the bank being in possession of such facts pays the check, it does so at its peril.

So, in the case where the government issued its pension check to a deceased person whose name was forged and the check paid, held that it devolved upon the bank to know that the party endorsing the check was the legal holder. The government could recover from the bank, whose duty it was to detect the forgery.[23]

§ 206. Nature and effect of check.

It is held, in the case of Cowing v. Altman, 71 N. Y. 435, that a check has no validity until delivery. In some jurisdictions, after delivery, it is regarded as an assignment of the deposit *pro tanto*, but generally it does not have this effect until it has been accepted by the drawee. A check is a written contract, and an oral declaration cannot be admitted to contradict or vary it; but between the original parties, evidence may be introduced to solve ambiguities, for example—to show what person or bank was intended, or to show in what capacity the drawer signed.[24]

§ 207. Check as payment.

A check which has been given upon a bank in the ordinary course of business for a debt, it is not payment until it is paid.[25]

If the payment of a check be refused without the holder's

23 United States *v.* First Nat. Bank of Coffeyville, 82 Fed. Rep. 410.

24 Jackson *v.* Sill, 11 Johns. (N. Y.) 201; McCullough *v.* Wainright, 14 Pa. St. 171; Sweet *v.* Stevens, 7 R. I. 375; Cork *v.* Bacon, 45 Wis. 192.

25 Kermeyer *v.* Newby, 14 Kan. 164.

fault or negligence upon his part, he may resort to the original indebtedness.[26]

The holder therefor becomes merely the agent of the drawer in getting the money to pay his debt.[27]

§ 208. Revocation of checks.

A revocation of a check is a direction given orally or in writing directly to a bank upon which a check has been previously drawn, that when it is presented, to refuse payment. It is the recall of a power or authority conferred.

After a check has been delivered, it may be revoked and the payee must look to the drawer.

If the check has been presented to the bank and accepted the bank cannot refuse payment.

The deposit is held by the bank subject to the order of the owner and an order to the bank to refuse payment upon a check is a sufficient justification not to pay. The bank, as to the direction of the deposit and to whom it must be paid is, for this purpose, an agent of the depositor.

The rule is settled that the drawer may countermand payment of his check either by giving notice orally or by a written notice delivered to the bank.

This rule has been enforced from time immemorial.

In the case of Dykers v. The Leather Manufacturer's Bank, 11 (Paige) N. Y. 612, "where a customer of a bank had given checks to different individuals for a much larger amount than his funds in the bank, and finding that he could not make them all good during banking hours, went to the bank and directed the officers not to pay any of his checks until further orders from him, and finally drew out the whole of his funds for the purpose of making a ratable distribution thereof among the holders of all the checks. Held, that the owner of one of the checks who had demanded payment thereof from the bank after the direction of the drawer not to pay it and before the fund was drawn out, was not entitled to claim the amount thereof against the bank. * * * And where different checks are presented to the bank at the same time, for sums

26 Bradford v. Fox, 38 N. Y. 289.

27 Cromwell v. Lovett, 1 Hall (N. Y.) 56.

which, in the aggregate exceed the amount of the funds of the drawer, the officers of the bank are not bound to settle the conflicting claims of the holders of the different checks to priority of payment."

The Supreme Court of the State of Illinois denies the rule as presented and alleges that, where a depositor draws his check on his banker who has funds to pay the same, it operates as a transfer of the sum named to the payee, and that the payee may sue for and recover the amount from the bank.

The court also holds that after a check has passed into the hands of a *bona fide* holder, it is not in the power of the drawer to countermand the order of payment.

Mr. Chief Justice Scott, in delivering the opinion of the court, says:

"This action is upon a check drawn by James H. Ledlie, on the Union National Bank of Chicago, in favor of Underhill and Gray, and by them indorsed and delivered to the Oceana County Bank, located at Pentwater, in Michigan. The declaration contains a special count upon the check, and also the common money counts. On the trial, plaintiff recovered a judgment for the amount of the check, with interest, and defendant brings the cause to this court on appeal.

"The evidence shows there was no unreasonable delay in presenting the check to defendant for payment, and, notwithstanding it is shown the bank had funds in its possession on deposit subject to check, at the time, belonging to the drawer, in excess of the amount of the check, payment was refused, for the reason the drawer had previously ordered the bank not to pay it.

"The facts proven in this case bring it clearly within the rule declared in Munn *et al.* v. Burch *et al.*, 25 Ill. 35. The doctrine of that case has been so frequently affirmed in other cases in this court, it is not necessary now to discuss it as a new question. The principle of all the cases in this court on this subject is, that, when a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and that a transfer of the check carries with it the title to the amount named in the check to each successive holder. After the

check has passed to the hands of a *bona fide* holder it is not in the power of the drawer to countermand the order of payment. The case at bar is controlled by this principle, and we content ourselves by simply making reference to our former decisions, where it is declared. The Chicago Marine & Fire Ins. Co. v. Stanford, 28 Ill. 168; Bickford v. First Nat. Bank, 42 id. 238; Brown v. Leckie *et al.*, 43 id. 497.

"Adhering, as de do, to the doctrine of the cases cited, we are of the opinion the evidence offered to prove facts establishing a defense as between the drawer and the drawees of the check was properly rejected." [28]

The States holding that the drawer can revoke his order at any time before the bank's acceptance of the check, and that the bank is bound by such revocation, are: Massachusetts, Charles River Nat. Bank v. Davis, 100 Mass. 413. Missouri, Albers v. Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355; Famous Shoe Co. v. Crosswhite, 51 Mo. App. 55. New York, Lunt v. Bank of North America, 49 Barb. (N. Y.) 221; Schneider v. Irving Bank, 1 Daly (N. Y.) 500, 30 How. Pr. (N. Y.) 190. Ohio, Kahn v. Walton, 46 Ohio St. 195, 20 N. E. Rep. 203. Pennsylvania, German Nat. Bank v. Farmer's Deposit Nat. Bank, 118 Pa. St. 294; Saylor v. Bushong, 100 Pa. St. 23, 45 Am. Rep. 353.

The Supreme Court in the case of The German Nat. Bank v. The Farmers' Deposit Nat. Bank, 118 Pa. St. 294, in discussing the question as to the right of the drawer of a check to countermand payment of the same, says:

"As I understand the case there are but two principles involved, viz.: (a) Had the Germania Savings Bank the right to stop payment on the check, and (b) if so, was the right exercised in time, that is to say, before actual payment? All other material questions in the case are but subdivisions of these.

"I presume no one at this day questions the right of the drawer of a check to stop the payment thereof. This is usually done by notice to the bank upon which the check is drawn. If the bank pays after such notice it does so at its peril. The holder of a check has no remedy against a bank

[28] The Union Nat. Bank *v.* Oceana Co. Bank, 80 Ill. 212.

upon which a check is drawn for its refusal to pay it. He must look to the drawer. The right to stop payment ceases of course with actual payment."

While the rule in Illinois is directly contrary to that laid down by the New York courts, the preponderance of authority sustains the rule that the drawer may at any time before acceptance, countermand the payment of his check, and that the bank cannot be held responsible in a suit brought by the payee. The bank can then refuse payment and is not compelled to ascertain the fact that the holder of the check has notice of its withdrawal.

A claim by the payee made to the bank that he has had no notice from the drawer of the check that payment has been countermanded, can make no difference. The bank may, after such notice is given by the holder of the check, pay another check drawn by the owner of the deposit. The bank is not a party subject to be brought into the differences which may exist or be the cause of the revocation. The payee, the courts hold, must look to the drawer.

The payee of a check, where there has been no revocation, and upon refusal of the bank to pay, must look to the drawer, and where notice has been given that payment has been countermanded, the rule is strengthened that the payee cannot sue the bank.

Where the check has been certified by the bank but before payment has been made, a notice is given to the bank that the check has been revoked, the notice comes too late. The bank, upon certification by the act of certification, charges the account of the drawer with the check, and from that date the bank enters into a new relation with the payee and agrees to pay him the amount so certified.

An attachment or garnishment of the funds deposited by the drawer, revokes payment or stops payment of all checks until the question is judicially determined.

Death revokes payment where the bank has notice before the check is presented.

This rule works a great hardship in many instances, but the weight of authority sustains it evidently upon the sensible reasoning that the execution and delivery of a check is not a payment or a transfer of the funds. It is an order which may

be revoked at any time by the drawer of the check, and no reason for the revocation need be given to the bank.

A bank cannot safely pay checks presented after death. If it did so, it would become involved in law-suits without number. Therefore, the sensible rule that governs and controls all the property of the deceased at the time of his death is, that all property passes by the law into the hands of deceased's legal representatives, and all unpaid checks are revoked.

§ 209. Presentment for payment.

This subject is treated only, *first*, as to the duties of the payee receiving a check in presenting the same for payment; and, *second*, as to the duties of the bank to pay or refuse payment.

This eliminates all persons other than the payee to whom the check is made payable, the drawer (the party who makes the check), and the drawee (the bank that is requested to pay the same.

The general rule is that the payee is not bound to present the check for payment on the day of its date or receipt, but may hold the same and present it to the bank for payment at any time prior to the running of the Statute of Limitations. When presented, if not paid by the bank, it is an evidence of an unsatisfied debt.

It has been held that a failure to present a check within a reasonable time (and a reasonable time is one which depends upon the circumstances of each case) or use due diligence (which is a question for the jury), will discharge the indorsers, but not the drawers of the check. The failure by the payee to present the check for payment within a reasonable time does not discharge the debt, but the drawer of the check (it is held) if laches or negligence is shown in presenting the check, may be absolved, at least to the extent of his injury.

This introduces the question: What is the drawer's injury? There can be no injury to the drawer if the check, when presented, is paid by the bank.

The presumption of law is, that the check when drawn and delivered to the payee, represents a debt which the drawer intends to cancel. It is also a presumption of law, that at the

time of the execution of the check, the drawer has made provision for the payment of the same by placing the money in the bank. And upon what theory of reasoning can it be claimed that by a failure of the payee to present the check within a reasonable time, the drawer is injured?

The drawer has given the check and by depositing the money in the bank has provided for its payment. The money is supposed to be set aside for that purpose, and if the payee fails to present his check and draw it, there can be no injury to the drawer. The injury, if any, is one which the payee has brought upon himself by his own negligence, and he is the party who must suffer the financial loss, if any, which is brought about by his own negligence.

While the payee's right of action is against the drawer of the check, if the bank refuses or fails to pay the same, a complete defense by the drawer would be to show that the payee failed to use due diligence in presenting the check.

The drawer of the check cannot recover damages upon the ground that the payee failed to do a thing, which failure operated as a detriment to him (the payee), because he (the drawer) has suffered no injury.

When "A." draws a check to "B." for funds then standing to his credit on the books of the bank, as between "A." and "B.," the funds are supposed to be transferred at once to "B." Thereafter "A." should not draw checks against the money which he has transferred by check to "B." Between the drawer of the check and the bank, there can be no change of relationship as to the funds deposited, until the payee presents his check for acceptance or payment.

If the payee fails to use due diligence in presenting his check and the bank suspends payment and closes its doors, he releases the drawer and must look to the bank for payment. He has "slept upon his rights." [29]

It is advisable, therefore, in view of the fact that the bank may become insolvent or that the drawer of the check may withdraw the funds from the bank before payment, to present the same at *the earliest time possible*, which, if done, is a reasonable time and is due diligence.

[29] First Nat. Bank of Charlotte *v.* Alexander, 84 N. C. 30.

The rule of "due diligence," as stated in a previous chapter may again be stated here, and is as follows:

"*Where the payee's check is on a bank which is located in the town or city in which the payee lives, the check should be presented for payment within banking hours on the day following the day of its receipt. If the bank upon which the check is drawn is located and doing business in a town or city other than the residence or place of business of the payee, the check must be, on the day of its receipt by the payee or within banking hours on the day following, sent by mail to the drawee or deposited for collection with a banker.*"

The payee, having at the earliest time possible presented the check, cannot suffer injury or loss by his own negligence or lack of diligence.

This brings us to the second question as to the duty of the bank to pay or refuse payment of a check.

It may be stated that the general rule is, it is the duty of a bank to pay a check which is properly drawn and presented to the bank within banking hours.

If the check lacks any of the essential elements and discloses upon its face a suspicion as to its genuineness, and the bank becomes satisfied that its defects are material, it is the duty of the bank to refuse payment and immediately notify the drawer.

If the check on presentation is properly drawn and fulfills all the essential requisites, and the drawer has on deposit sufficient funds to meet the same, it is the duty of the bank to pay the check, and if it refuses, it will be liable in a suit by the drawer for damage sustained.

§ 210. Mistake of bank in payment of check.

The general rule is, that if a bank honors and pays a check under a mistake of fact, it may sue for recovery of the money, but if it pay a check under a mistake of law, the money cannot be recovered.

In the case of Redington v. Woods, 45 Cal. 406, the courts hold that where the drawee pay to an innocent holder a check which has been fraudulently altered in amount after it left the hands of the drawer, he will be entitled to recover back from the person to whom it was paid, the excess over the true amount of the check, unless the alteration is made

in such a manner that on the face of the paper there appears enough evidence to excite suspicion of fraud, or the drawee has information which would lead a prudent person to suspect that the check had been altered.

The court, in discussing this question says:

"When, therefore, the holder presents a check or bill for payment, the title to which he derives through prior indorsements, he undertakes with the drawee that the indorsements are genuine, and that he has a valid title, and consequently, a right to receive the money. If it afterward transpires that one or more of the indorsements are forged, the drawee will be entitled to recover back the money from the person to whom he paid it, on the ground that the latter had no title to the bill or check, and the payment was, therefore, made without consideration, under an innocent mistake. But the indorsement of the holder receiving payment can have, at most, no greater legal significance than this. It implies, at best, only an undertaking that he has a valid *title* to the bill or check, and consequently a right to receive payment — an implication which the law raises without the indorsement. But the indorsement, *proprio vigore*, imposes upon him no other or greater liability to refund money paid upon an altered check than would attach to him without the indorsement.

"In other words, the indorsement does not, of itself, import an undertaking that the check has not been altered, and in proceedings to recover back the amount paid on an altered check, the indorsement could not be made the foundation of the action, as importing a promise to refund the money, in case it should afterward appear that the amount in the body of the check had been fraudulently altered. In such cases the right of recovery does not rest, in whole or in part, upon the indorsement, as importing such a promise, but upon the fact that the money was paid by the drawee without consideration, *under an innocent mistake.* The authorities in support of this view of the question are numerous and uniform, and we have been referred to none to the contrary."

"Where a bank pays money by mistake to the payee of the check which the bank has been instructed by the drawer not to pay, and there is no suggestion that the check was given to the payee as a gratuity or merely for his accommodation,

the bank must first tender the check to the payee before bringing an action to recover the money so paid."

The Supreme Court of the State of Massachusetts, in the case of The Northampton National Bank v. Charles H. Smith, 169 Mass. 281, in discussing this subject, says:

"This action is brought to recover money paid by mistake by the plaintiff to the defendant, upon a check which the plaintiff had been instructed by the drawer not to pay. The statement of facts is imperfect, but it is said in the plaintiff's brief that the check was drawn upon the plaintiff by one Herbert in favor of the defendant, and given by him to the defendant. There is no suggestion that it was so given as a gratuity or merely for the defendant's accommodation, and we assume that it was not so given. Payment had once been demanded and refused, but on a second presentation of the check several weeks later it was paid through inadvertence. The plaintiff demanded a return of the money without tendering the check to the defendant, and there was no such tender until the day of the trial. The only question which has been presented to us is, whether it was necessary to tender the check before bringing the action, and we think it was.

It has often been held that, when one wishes to rescind a contract and recover what he has paid under it, he must first restore whatever of value he has received. Snow v. Alley, 144 Mass. 546, 551; Bartlett v. Drake, 100 Mass. 174, 176. The reasons for this rule are fully applicable to the present case. The check, if unpaid, belonged to the defendant and would be useful and valuable to him to be used in connection with his own testimony in establishing a claim against Herbert. It has been held that anything absolutely worthless, like a counterfeit bill, need not be returned. Brewster v. Burnett, 125 Mass. 68; Kent v. Bornstein, 12 Allen (Mass.) 342; Snow v. Alley, 144 Mass. 546, 551; Reed v. Boston Machine Co., 141 Mass. 454. But the check in the present case was not of that character. If, upon its presentation payment had been refused, the plaintiff would have had no right to retain possession of it, and such retention against the defendant's will would have been a conversion. And if after a payment had been made through inadvertence or mistake, the plaintiff sought to enforce a return of the money, it was its duty first to tender the

check to the defendant. It would be of use to him and he was entitled to have it before returning the money.

"The case of Evans v. Gale, 21 N. H. 240, is much in point, and the doctrine of this decision was affirmed in Cook v. Gilman, 34 N. H. 556. The same doctrine is implied in Coolidge v. Brigham, 1 Met. 547, 550; Merchants' National Bank v. National Eagle Bank, 101 Mass. 281, 285; Estabrook v. Swett, 116 Mass. 303, and Bassett v. Brown, 105 Mass. 551, 558. See also Otisfield v. Mayberry, 63 Me. 197; Park v. McDaniels, 37 Vt. 594."

"In an action by one bank against another to recover back the amount of a check paid through the clearing-house under a mistake of fact caused by the fraud of the drawer, the measure of damages is, the difference between the amount of the check and the amount for which he was entitled to draw, and the fact that, where there is not enough money on deposit to pay a check in full, the ordinary custom is to return the check, is immaterial." [30]

Where a bank pays a check under a mistake of law, *i. e.*, in ignorance of the law, but with a full knowledge of the facts, it cannot be recovered back.

The Supreme Court of the State of Missouri, in the case of The Mutual Savings Institution v. Enslin, 46 Mo. 200, says:

"Now, if the plaintiffs paid over to the defendant the proceeds of that note" (check) "under a mistake of law merely, and not under a mistake of fact, they are not entitled to recover back the money so paid. In assuming to judge of the legal rights of the rival claimants, without referring the matter to the courts and paying according to their view of those legal rights, they acted at their peril and must submit to the consequences. It is a well-settled principle that money paid under mistake or ignorance of the law, but with a knowledge of the facts or the means of such knowledge, cannot be recovered back from the party to whom it was paid. 2 Greenl. Ev., § 123; Chit. Cont. (7th ed.), 626, 627. And see the authorities cited in note 1, p. 628; Tyler v. Smith, 18 B. Mon. 793; City of Marietta v. Slocomb, 6 Ohio St. 471."

"When payment is made to the holder of paper who has

[30] Merchants' Bank *v.* Bank of the Commonwealth, 139 Mass. 513.

come into possession of it without any fault on his part, and his situation would be rendered worse if compelled to refund than it was before receiving payment, the money cannot be recovered from him." [31]

"To justify the payee in holding and retaining the money, the bank alone must have been negligent."

The above rule is sustained by the States in the following order:

Illinois,[32] Kentucky,[33] Louisiana,[34] Maine,[35] Maryland,[36] Massachusetts,[37] Minnesota,[38] New Hampshire,[39] New York,[40] Ohio,[41] Pennsylvania,[42] Texas,[43] Vermont,[44] United States.[45]

The rule is that, if "neither party has been negligent or both have been, then the bank can recover the money." [46]

§ 211. Forged checks, bank paying.

The rule is settled that a bank which pays a check on a forged indorsement has no rights against the drawer. The

31 Cyclopedia of Law and Procedure, Vol. 5, p. 546, and authorities there cited.

32 Quincy First Nat. Bank v. Ricker, 71 Ill. 439, 22 Am. St. Rep. 104.

33 Georgetown Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10, 11 Ky. L. Rep. 803, 13 S. W. 339, 7 L. R. A. 849.

34 Levy v. Bank of America, 24 La. Ann. 220, 13 Am. Rep. 124; De Feriet v. Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597; McKleroy v. Southern Bank, 14 La. Ann. 458, 74 Am. Dec. 438; Smith v. Mechanics', etc., Bank, 6 La. Ann. 610.

35 Neal v. Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; Belknap v. Davis, 19 Me. 455.

36 Commercial, etc., Nat. Bank v. Baltimore First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554.

37 Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; Danvers First Nat. Bank v. Salem First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; Welch v. Goodwin, 123 Mass. 71, 25 Am. St. Rep. 24; National Bank of North America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; Gloucester Bank v. Salem Bank, 17 Mass. 33; Young v. Adams, 6 Mass. 182; Belknap v. National Bank of North America, 100 Mass. 376, 97 Am. Dec. 105.

38 Germania Bank v. Boutell, 60 Minn. 189, 62 N. W. 327, 51 Am. St. Rep. 519, 27 L. R. A. 635.

39 Star F. Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442.

40 National Park Bank v. New York Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Goddard v. Merchants' Bank, 4 N. Y. 147; Bank of Commerce v. Union Bank, 3 id. 230; Canal Bank v. Albany Bank, 1 Hill (N. Y.) 287.

41 Ellis v. Ohio Life Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610.

42 Levy v. United States Bank, 4 Dallas (U. S.) 234, 1 L. Ed. 814, 1 Binn. (Pa.) 27.

43 Rouvant v. San Antonio Nat. Bank, 63 Tex. 610.

44 St. Albans Bank v. Farmers', etc., Bank, 10 Vt. 141, 33 Am. Dec. 188.

45 United States Bank v. Georgia Bank, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; United States v. New York Nat. Park Bank, 6 Fed. 852.

46 Leavenworth First Nat. Bank v. Tappan, 6 Kan. 456, 7 Am. Rep. 568.

discovery by the bank of its error makes no difference. The banker is bound to know the handwriting of its customer. If he pays a check which has been forged, the mistake is his.

The rule is so well established, it seems almost unnecessary to cite cases in support of it. The question is one of importance, however, and has so frequently been discussed by the courts of the various States it is deemed advisable to here give the citation of cases treating upon this subject as presented by the Cyclopedia of Law and Procedure, Vol. 5, page 548:

California,[47] Connecticut,[48] District of Columbia,[49] Georgia,[50] Illinois,[51] Iowa,[52] Kentucky,[53] Maryland,[54] Massachusetts,[55] Missouri,[56] New York,[57] Tennessee,[58] Utah,[59] United States,[60] England,[61]

Where a bank pays a check upon an indorsement made not by the true owner but by a person having the same name of the true owner, it must, when called upon, make good the amount to (the drawer) or the true owner.

In the case of Graves v. The American Exch. Bank, 17 N. Y. 203, in discussing this question, the court holds that

47 Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131.

48 Bristol Knife Co. *v.* Hartford First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

49 Millard *v.* National Bank of Republic, 3 MacArthur D. C. 54.

50 Freeman *v.* Savannah Bank, etc., Co., 88 Ga. 252, 14 S. E. 577; Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

51 Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289.

52 German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399.

53 Henderson Trust Co. *v.* Ragan, 21 Ky. L. Rep. 601, 52 S. W. 848; Rice *v.* Citizens' Nat. Bank, 21 Ky. L. Rep. 346, 51 S. W. 454.

54 Williams *v.* Drexel, 14 Md. 566.

55 Belknap *v.* National Bank of North America, 100 Mass. 376, 97 Am. Dec. 105.

56 J. M. Houston Grocery Co. *v.* Farmers' Bank, 71 Mo. App. 132.

57 Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; Citizens' Nat. Bank *v.* Importers', etc., Bank, 119 N. Y. 195, 23 N. E. 540; Corn Exchange Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Thompson *v.* Bank of British North America, 82 N. Y. 1; Ætna Nat. Bank *v.* New York City Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Morgan *v.* State Bank, 11 N. Y. 404.

58 Jackson *v.* McMinnville Nat. Bank, 92 Tenn. 154, 20 S. W. 802, 36 Am. St. Rep. 81, 18 L. R. A. 663; Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

59 Brixen *v.* Deseret Nat. Bank, 5 Utah, 504, 18 Pac. 43.

60 Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229; United States *v.* National Exchange Bank, 45 Fed. 163.

61 Roberts *v.* Tucker, 16 Q. B. 560, 15 Jur. 987, 20 L. J. Q. B. 270, 71 E. C. L. 560; Beeman *v.* Duck, 12 L. J. Exch. 198, 11 M. & W. 251; Mead *v.* Young, 4 T. R. 28, 2 Rev. Rep. 314.

the bank is bound to ascertain that the person to whom it makes payment is the genuine payee or is authorized by him to receive it.

The opinion of the court, which was written by Comstock, J., though confirmed by the judges is dissented to by Justice Roosevelt. The dissenting opinion is of sufficient importance bearing upon this question to justify a full citation:

"There were two persons of the name of Charles F. Graves. The drawer of the bill in question, directed the American Exchange Bank to pay $240 to the order of Charles F. Graves. 'Fredonia, N. Y.,' was the designated residence of the drawer, and 'New York' that of the drawees. The payee had no designation but his name; none at all events was given by the drawer. The bank in good faith paid the draft to a person presenting it with the indorsement of Charles F. Graves, a genuine indorsement, but not the indorsement, it is said, of the genuine Graves. Which of the two, under these circumstances, should bear the loss — the drawer who carelessly omitted all designation, or the drawees who innocently paid the wrong person in consequence of such omission? As between these parties, the loss, it seems to me, should fall on the former. Nor do I perceive that the payee, the *quasi* assignee of the drawer, occupies any better position than his assignor. Hurd was his debtor, and bought the draft to remit in payment of the debt. Hurd directed the form. He did nothing to supply the drawer's omission, but aggravated the error by another of his own; he mailed the draft to Charles F. Graves, La Salle, Illinois, intending it, he says, for Charles F. Graves, Mendota, Illinois, the two places being only fifteen miles apart. He candidly admits he 'made a mistake in directing the letter, and that he should have directed it to Mendota instead of La Sâlle.' He thus by his own act put the draft into the hands of the La Salle Graves, and held out the La Salle Graves as the real payee. Can he complain, then, that the Exchange Bank recognized his indorsement? Must they pay twice because he, after 'full warning,' as he admits, chose to be careless of his own interests? Or would it not be more just that he himself should pay the Mendota Graves to whom he confessedly was indebted, and whose debt confessedly was not discharged by this remittance to the wrong per-

son, and who swears that 'he never had possession of the draft, and never authorized any one to indorse his name upon it, and never authorized any one to take possession of it.' How, too, I would ask, with such a statement sworn to by him on the trial, can he maintain an action of trover, resting his complaint on the averment that he had been 'in possession' as the legal owner?

"The judgment should be reversed."

The Supreme Court of the State of California in the case of People v. Bendit, 111 Cal. 274, defines the crime of forgery and says:

"When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself — in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name or to sign his name as agent, by which a person is deceived and defrauded, is not forgery.

"There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not." [62]

§ 212. Right of bank against presenter and owner of forged paper.

"If the presenter owned the paper at the time of its payment, the money must be refunded on discovery of the forgery provided his condition has not in the meantime changed so as to render a payment unjust." [63]

In the case of the Star Fire Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442, the court says that "the drawee, who, without notice of any forgery, has paid a draft to the holder to whom it was negotiated, by the forged indorsement of the payee's name, may recover of the holder the money paid upon the draft."

In the case of Birmingham Nat. Bank v. Bradley, 103 Ala. 109, in an action to recover money paid on a forged check, in the syllabus of said case, the reporter says:

[62] People *v.* Cole. 130 Cal. 13.

[63] Cyclopedia of Law and Procedure, Vol. 5, p. 549.

"The payee of a check who indorses it, and receives the money thereon, guarantees the genuineness of said check to the indorsee, and as to the payee indorser the indorsee is under no obligation to discover its forgery; and if the check is forged, the indorsee may recover from such indorser the money paid him in an action of assumpsit. * * *.

"Where a forged check has been forwarded by an indorsee bank to the drawee bank for collection and the latter bank credits the forwarding bank with the amount of such check, without actually remitting the money, on discovering the forgery, the drawee bank can charge said amount back to the forwarding bank."

The rule formerly prevailing that the banker must know the drawer's signature, and if it pays a forged check, must bear the loss as between it and the holder, is modified by the courts, and the rule which is now accepted is very clearly stated in the case of Danvers Bank v. Salem Bank, 151 Mass. 280.

The court, in defining the rule in this case says:

"In the case at bar, the plaintiff seeks to recover from the defendant the amount of a forged check in the name of one of the plaintiff's customers, for which it had given the defendant credit as money.

"In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery. It is presumed that the bank knows the signatures of its own customers, and therefore is not entitled to the benefit of the rule which in cases of forgery permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which the fraud has been effected. This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud, or the mistake of fact under which the payment has been made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion with-

out proper precaution or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud. National Bank of North America v. Bangs, 106 Mass. 441, 445. Where a loss which must be borne by one of two parties alike innocent of the forgery can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded. Gloucester Bank v. Salem Bank, 17 Mass. 33. To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken. Ellis v. Ohio Ins. & Trust Co., 4 Ohio St. 628; Rouvant v. San Antonio Nat. Bank, 63 Tex. 610; First Nat. Bank of Quincy v. Ricker, 71 Ill. 439."

§ 213. Alteration after signing and uttering.

Where the drawer of the check, in the writing of the same, so carelessly writes the amount intended to be withdrawn, leaving a blank space preceding the writing which may be used to raise the sum from that written, and utters and circulates the same in this form, and it is, after passing from the maker's hands, altered and presented to the bank for payment, the bank cannot be held responsible unless it was possible to discover the alteration.[64]

The rule, as laid down in the case of National Bank v. Nolting, 26 S. E. Rep. 826, is stated as follows: "The depositor is only charged with ordinary care."

The court, in determining the character of negligence that would impose the loss upon the maker, illustrates it by the case of Young v. Grote, 4 Bing. 253. The facts are stated as follows: "Where the depositor, going away from home, left with his wife several checks which he had signed in blank, and which she was to fill up according to her needs, she filled up

64 Mahaiwe Bank v. Douglas, 31 Conn. 170; Belknap v. Bank of North America, 100 Mass. 376.

one for 'fifty-two pounds, two shillings,' but she began with the word 'fifty' with a small letter, and in the middle of a blank line. In writing the marginal figures, likewise, she left a considerable space between the 'pound mark' and the figures '52,' she gave the check in this form to her husband's clerk, to get the money upon it." The court, in commenting upon the drawing of the check says, "Here the check had been so carelessly written that the forgery was made the simplest matter in the world, and the court held that the loss must rest with the drawer."

The rule as between the bank and the depositor or maker of the check may be stated as follows:

If the check is so carelessly drawn by the maker as to admit of alterations, which cannot be detected by the bank's paying teller, whose duty it is to scrutinize all checks, the drawer of the check must suffer the loss. On the other hand if the check is carefully drawn, and the usual requirements of the law are complied with, as to the essentials of form, etc., and the bank pays such a check which shows erasures, interlineations or alterations, which evidently changes the original in any material matter, and which could be observed by a careful examination of the instrument, and a loss occurs to the maker by such alteration and through payment thereof by the bank, it must stand the loss.

The alteration of the written or printed portion of the check is material, while the change of the figures designating the sum of the check to be withdrawn may not be. The amount of the check or sum to be withdrawn, when written in a legible hand, if altered and changed, should be refused payment until explained. The written amount controls the action and decision of the paying teller and not the amount denoted by the figures.

The case of the City Nat. Bank of Fort Worth v. Stout, 61 Tex. 567, is a clear illustration of the rule that the writing of the amount controls and determines the action of the bank paying the check. The facts in this case are stated as follows:

"That on the 21st day of September, 1881, plaintiff went into defendant's banking house and requested defendant to sell him certain exchange on the city of New York to the

amount of $500, and to make its draft or bill of exchange on some bank in New York for the $500, payable to one Frank Crandall, who was plaintiff's son-in-law; that the bank then, through its cashier, S. W. Lomax, drew its draft as follows:

"$500.

"THE CITY NATIONAL BANK OF FORT WORTH,

"(Original.) Fort Worth, Texas, Sept. 21, 1881.

"Pay to the order of Frank Crandall five thousand dollars.

"S. W. Lomax, Cashier.

"To Donnell, Lawson & Simpson, New York.

"No. 875."

and delivered the same to plaintiff; that the figures on the margin of the draft were correct ($500) at the time the draft was made, but had afterward been changed by the addition thereto of another figure 0, by someone unknown to defendant, and that the bankers, Donnell, Lawson & Simpson, upon whom said draft was drawn, had in good faith cashed the same, believing it to be a *bona fide* draft for the sum of $5,000; that defendant did not discover the mistake until October 22, 1881, long after the draft had been paid to plaintiff and his assignees for the full amount of $5,000, and upon settlement with said Donnell, Lawson & Simpson.

That defendant immediately upon discovering the error, and upon ascertaining that Donnell, Lawson & Simpson had cashed the draft for the sum of $5,000, demanded of plaintiff an explanation thereof, and that plaintiff repay to defendant the sum of $4,500, which it alleged defendant by mistake paid and caused to be paid to him and to Crandall, but that neither plaintiff nor Crandall would explain to defendant their fraudulent action, and they both refused to repay to defendant the sum of $4,500 or any part thereof; but insisted upon their right to take advantage of the mistake."

It will be observed that the draft was drawn showing the amount of the same as written in the body of the check to be "five thousand dollars." The writing was not changed, but the figures which were inserted, and correctly for $500, were raised by the addition thereto of another figure 0.

The bank set up as a defense to the suit "that plaintiff purchased the $5,000 draft; that plaintiff and his payees received the benefit of the same, and that plaintiff thereby became liable and promised to pay in the sum of $4,500 balance."

In disposing of the defense and the case the court says: "The mistake in the amount for which the draft was drawn was made by the cashier of the bank, and it does not appear that the appellee had any notice whatever of the mistake when he handed back the draft to the cashier with request that he would inclose it in an envelope, direct it to Crandall, and deposit it in the post office with the bank's mail. The appellee received no benefit from the mistake, and however fraudulent may have been the conduct of Crandall in receiving $5,000 on the draft, which he most probably knew was intended to enable him to receive 500 only, yet the mere fact that he was the son-in-law of Stout, to whom Stout intended to make a present of $500, could not render Stout liable to the appellant for an injury which resulted from its own want of due care and the fraud of another."

If it were shown that Stout knew of the mistake before he caused the draft to be mailed to Crandall, a different question would arise.

It is not shown by this case that the bank paying the draft observed the raising of the figures from $500 to that of $5,000, though this fact had been shown it would not evidently have changed the court's holding; but if the writing, which is the material part of the instrument, is changed, the drawee bank paying the same, when such change or alteration is discernable, must stand the loss.

§ 214. Right of possession to paid checks.

The question of the right to possession of paid checks may become one of importance, arising when paid by the bank, and when its possession becomes necessary as an item or document to be used in evidence.

In matters arising between the bank and the drawer, the bank is entitled to possession after payment. Proceeding upon the fact that a check is an order, and that it is always drawn upon a bank, and is in the nature of a request or direction for the payment of a named sum of money, which is a debt owing by the bank to the drawer, the bank, upon payment of the check, is entitled to retain perpetual possession of the same.

The right of possession by the bank to a paid check is based upon the principles of law which are recognized by the law

merchant, which consists of certain principles of equity and usages of trade which general convenience and common sense of right has established.

The common-sense view is that the bank, being a debtor, when it pays out its funds upon an order, which may be in the form of a letter or telegram, or an adopted form of instrument prepared by the bank, and called a check, it is entitled to retain possession of the instrument as its evidence that a specified sum of money owing by it to the drawer was paid.

The universal rule of law is that when a debtor pays a debt, upon an order addressed to him directing payment, he is entitled to retain perpetual possession of the instrument as an evidence of payment.

Mr. Wigmore, on evidence, says: "The payee of money naturally leaves behind him in the hands of the payor some document by way of receipt or evidence of payment.[65]

§ 215. Present rule.

By custom the rule is established that upon demand by the drawer made upon the bank it must deliver over to him all his paid checks. This rule has been established upon the hypothesis that the bank is the agent of the depositor, holding his funds for him as a trustee. Upon this theory the drawer may become entitled to possession of the checks. But upon the theory now so well established by the courts that the bank holding commercial deposits is a debtor to the depositor, it cannot be compelled to surrender its best evidence (in possession) of the fact that it has paid its debt.

The element or purpose for which the check is given, as between the drawer and payee, cannot in any way arise as affecting the right of the bank to the possession of the check.

The check is the instrument placed in the hands of the payee to be used by him for the purpose of withdrawing from the bank the money intended to be transferred to him, or the lawful holder, and after payment his right of possession to the check passes to the bank.

§ 216. Equitable and safe rule.

When a deposit of money is made in a commercial bank, the the relationship existing and established by law between the parties is one of debtor and creditor.

65 Wigmore on Evidence, Vol. 1, § 156.

A pass-book in the possession of a depositor is *prima facie* evidence of the debt of the bank to the owner of the book. At stated periods the bank notifies the depositor to bring in or deliver to the bank his book for the purpose of balancing the same, called "balancing the pass-book." The drawer's checks which have been paid are charged to his account and a balance is struck. The transaction then becomes, if all the items are settled between the parties, an account stated. At the time of balancing the pass-book, and settlement, the drawer of the checks should be required to make an examination of all checks charged up against him, and if any are forged or altered the declaration or fact should at the time and in the presence of the bank's agent be pointed out to the bank, otherwise the drawer thereafter should be estopped from alleging a forgery. After such examination of the checks they should be sealed and placed on file in the vaults of the bank for the purpose of evidence, should they be required, in matters arising between the maker and the payee.

The establishment of this rule, which the bank may enforce by a by-law, would forever settle the question as to when or within what period of time a forged or altered check could be declared a forgery and sued upon.

The present rule fixing the time when a suit may be brought is that if the drawer, upon discovery, give prompt notice, not being himself in fault, no length of time will bar the action to recover.[66]

As to what is a reasonable time in which notice must be given, the Supreme Court, in the case of Third National Bank of St. Louis v. Allen *et al.*, says: "The accepted rule is that the payor must be allowed a reasonable time to detect the forgery and demand restitution; what will be a reasonable time will greatly depend on the circumstances of each particular case."[67]

In Koontz v. Central National Bank (51 Mo. 275) the court held that where a draft was paid by mistake in July and no

[66] Canal Bank *v.* Bank of Albany, 1 Hill, 287; Star Fire Ins. Co. *v.* New Hampshire Nat. Bank, 60 N. H. 442.

[67] Third Nat. Bank *v.* Allen *et al.*, 59 Mo. 310.

notice was given by the defendant of the error till the following December, Held, the plaintiff might still recover.

The rule as stated and the cases enunciating and sustaining it as the law leaves (but little hope and) no defense for a bank that permits its paid receipts or checks to be taken out of its possession, for at any time after discovery the drawer, not being in fault, may sue the bank for the amount paid out on the forged instrument, which forgery may have been perpetrated after it left the possession of the bank. Hence, the just and equitable rule allowing the bank to retain possession of the check.

CHAPTER XXII.

OVERDRAFTS.

§ 217. When unlawful.

A bank paying a check drawn upon it by a person when that person has no funds deposited with the bank to meet the check, or where the check is for a greater amount of funds than the drawer has in the bank at the time of presentment, the payment of the check by the bank creates an overdraft.

The practice of banks allowing its customers to overdraw their accounts is one which is in violation of all legitimate banking.

There is no expressed or implied power granted by the law authorizing the officers of a bank to honor and pay checks issued by its customers unless there are sufficient funds deposited in the bank to pay such checks when presented.

An overdraft on a bank which is created through the acts of any of its officers, and who knowingly permits the same to be created without having direct authority from the board of directors, is guilty of a breach of trust and liable to an action to make good the amount.

A check drawn upon a bank and passed by a person knowing at the time of the drawing and passing of the check, that he had no means in the bank to pay the same and having made no previous arrangements with the bank to pay such a check, the act is obtaining credit falsely, and is a fraud.[1]

§ 218. Usage or practice, no authority.

The Supreme Court of the United States in the case of Minor v. The Mechanics' Bank of Alexandria, 1 Pet. 46, in discussing the question of the established usage, custom, and practice of the bank in permitting overdrafts, which was claimed to be a justification by usage and practice, the court says: "We may now proceed to the consideration of the three instructions prayed for, in behalf of the defendants. The first

1 Merchants' Bank *v.* State Bank, 10 Wall. 604.

is, in substance, that if it were the established usage and practice of the bank, that the cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up, without present funds in the bank; and for the cashier to receive and pass, as cash, checks and drafts upon other banks, and if the balances appearing against such persons charged in the books of the bank, arose out of the exercise of such discretion by the cashier, in the course of the ordinary transactions of the bank, and pursuant to the established usage and course of business there adopted and generally known to the president and directors, practiced and continued with their knowledge, for a series of years, from the commencement of the bank, to the termination of Minor's cashier-ship, though the existence of such balances or the particular circumstance attending them, were not formally communicated to the board of directors, the jury may infer the approbation, assent, and acquiescence of the president and directors as to such usage and course of business.

The refusal of this instruction is matter of no small embarrassment and difficulty to this court, from the terms in which it is couched, and the issues on the sixth, eighth, and ninth pleas, to which alone it can be properly applied. Those issues put to the jury the question whether the acts of the cashier, whatever might be their character or kind, were, or were not, done by the wrong, connivance, and permission of the president and directors of the bank. The point of the instruction is, that the established usage and practice of the bank for a long period, known to the president and directors, does afford a presumption of the approbation, assent, and acquiescence of the president and directors, as to such usage and practice; though the balances resulting therefrom were not formally communicated to the directors. From the shape of the prayer it is undoubtedly meant that such usage and practice was known to the president and directors, as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit that such a presumption could not ordinarily arise. The ordinary practice and usage of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors,

to whom the charter and by-laws submit the general management of the bank and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business would, in general, bind the bank in favor of third persons possessing no other knowledge. In the case of the Bank of the United States v. Dandridge, 12 Wheat. 64, the subject was under the consideration of this court, and circumstances far less cogent than the present to found a presumption of the official acts of the board were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to in the instruction, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this court, that it ought to have been given.

"The pertinency of such a presumption to these issues cannot admit of dispute. But the real difficulty remains to be stated. Assuming that the court, upon these issues, ought to have given the instruction prayed for, the question is whether upon the whole record, that is such an error as now justifies this court in a reversal of the judgment. If the instruction had been given and thereupon a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues in favor of the defendants; or ought the judgment, *non obstante veredicto*, to have been for the plaintiffs? If it ought, then the error becomes wholly immaterial; since, in no event, could the instruction in point of law, have benefited the defendants. *Upon deliberate consideration, we are of opinion, that the pleas, on which these issues are founded, are substantially bad. They set up a defense for the cashier, that his omission "well and truly to perform" the duties of cashier, was, by the wrong, connivance and permission of the board of directors. The question then comes to this, whether any act or vote of the board of directors, in violation of their own duties, and in fraud of the rights and interest of*

the stockholders of the bank, could amount to a justification of the cashier, who was a particeps criminis.

We are of opinion that it could not. However broad and general the powers of the direction may be, for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended that the board could, by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud — every known departure from duty by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals, or less pernicious in its effects than the case supposed, would still be an excess of power from its illegality — and as such, void, as an authority to protect the cashier in his wrongful compliance. Now, the very form of these pleas sets up the wrong and connivance of the board as a justification, and such wrong and connivance cannot, for a moment, be admitted as an excuse for the misapplication of the funds of the bank by the cashier."

The court very clearly defines the law to be that a custom or practice which, if unlawful, cannot be sanctioned, legalized or made lawful by the knowledge or orders of the board of directors.

In Peterson v. Union National Bank 52 Pa. St. 206, the court says: "The drawing a check upon a bank in which the drawer has no funds, and uttering it, is a fraud. It amounts to a false affirmation that the money is there to meet it. Hence it is a deceit practiced upon any person to whom the check may be negotiated and equally upon the bank upon which it may be drawn."

§ 219. Overdrawing may be legalized.

Proceeding upon the theory that an overdraft is an unsecured loan, it may be legalized by an agreement made in ad-

vance with the bank, whereby the drawer's checks up to a given sum are to be paid, though he has no money on deposit at the time to draw against. This may be done by the drawer indorsing over to the bank collateral security to secure advances (future advances) which it may make from time to time. A transaction of this nature eliminates it from all taint or fraud and establishes the overdraft as a loan which may be authorized and directed to be made by the board of directors. But where an officer of bank, with power to make loans, allows persons to overdraw or draw against the credit and funds of the bank without any previous arrangement as to security, the transaction cannot be legalized by the board of directors or by custom or practice. One unlawful act does not make another of the same nature legal or lawful by custom or practice. All such acts are frauds upon the bank. Neither can the board of directors make such acts lawful by acquiescence or approval. By attempting to legalize an unlawful act they make themselves personally liable.

§ 220. Officer allowing overdraft, criminal act, when.

"The mere fact of payment by the officer of a national bank of a check which creates an overdraft does not necessarily constitute a fraudulent misapplication of the funds of the bank."

"If an overdraft is made and allowed under circumstances justifying it or even under circumstances making it a fraud upon the bank, the entry of the transaction just as it occurred on the books of the bank is not a false entry under Revised Statutes, U. S., § 5209." [2]

Where an officer of a bank pays a check drawn by a person who has no funds in the bank or other security, and at the time of payment he had knowledge, or was in a position to acquire knowledge of the fraudulent intent of the maker of the check, his act would constitute a criminal misapplication of the funds of the bank. "The drawing of a check unexplained must be deemed a fraud." [3]

§ 221. Drawer liable to bank for overdrafts.

A bank can recover from the drawer the amount of overdraft. It is held in Franklin Bank v. Bryam, 39 Me. 489,

[2] Dow v. United States, 82 Fed. Rep. 904.

[3] Franklin v. Vanderpool, 1 Hall (N. Y.) 78; True v. Thomas, 16 Me. 36.

that if the cashier of a bank, though he pay money wrongfully, if it "can be traced into the hands of one cognizant of his breach of trust and participates in his wrongdoing, it is difficult to perceive why redress should be denied the bank."

"Where a depositor gives a check on his bank and his account is thereby overdrawn, a promise to pay the bank, if it honors the same, is to be implied."[4]

[4] Thomas *v.* International Bank, 46 Ill. App. 461.

CHAPTER XXIII.

CERTIFICATES OF DEPOSIT.

§ 222. Defined to be promissory notes.

A certificate of deposit is defined to be a written evidence of debt; an obligation entered into by the bank agreeing to repay a certain sum of money to the payee or the lawful holder of the same, on demand or at a stipulated time. A certificate of deposit, unless containing words especially denoting that it is non-negotiable, comes within the class of negotiable instruments. A certificate of deposit when once accepted, the time having been fixed in which the money is to be returned, cannot be presented for payment until the date of its maturity.

This custom of issuing certificates of deposit by banks rather than pass-books, came into use as a special accommodation to the bank's customers, as the issuing of such a certificate is a certification on the part of the bank that a certain indebtedness is due by the bank upon the same.

Certificates of deposit frequently bear interest in a sum agreed upon between the parties, and the rate of interest specified therein becomes an obligation of the bank to the holder of the certificate. An officer agreeing to pay a rate of interest other than that authorized by the board of directors to be paid upon such deposits, makes himself personally responsible, as it has been held that an officer has no authority to agree to pay interest upon deposits unless authorized to do so by resolution of the board of directors. Certificates of deposit when issued by the bank, specify a certain sum of money due from the bank to the holder or owner of the same, and when presented for payment, a partial payment should never be entered or credited upon the certificate, but when presented it should be canceled, the certificate preserved and filed among the paid certificates, and a new certificate issued for the difference due upon the same. A certificate of deposit is, in a legal sense, as between the bank and the holder, a note; and as between the parties set-offs are allowed; and as between the bank and an

innocent holder, by purchase from the payee, the bank cannot set-off a debt that may be owing from the party first holding the certificate, it being a negotiable instrument, is governed by the law affecting such instruments.

A certificate of deposit, by a large number of the courts is held to be nothing more or less than a promissory note. The form of the certificate ordinarily used, supplies and fulfills the definition and usual form of a promissory note.

The usual form of the certificate certifies that "A." has deposited with the bank a certain sum of money payable to himself or order, in current funds upon return of the certificate properly indorsed, said certificate to bear interest if the money is left on deposit for a certain period of time. The certificate is signed by an officer of the bank and dated.

The signing of a certificate by the cashier of a bank in his official capacity, is a sufficient signing. A certificate of deposit as between the bank and the holder of the certificate, is not issued or received as a promissory note. It is usually a transaction entered into by a depositor with the bank, who is not a "general depositor or customer," the purpose of the depositor in so depositing his money being, to receive interest upon a sum of money which he would not otherwise use for a fixed period of time; not desiring to open a commercial account he deposits his money for safekeeping, and at the same time to receive a compensation for the use of the same.

The depositor never treats the transaction as a loan to the bank. He does not understand the certificate to be a promissory note, and the bank issuing the instrument does not regard it as such. A bank usually, in borrowing money, does so by resolution, duly passed by the board of directors, authorizing the same to be made, and a promissory note in form is issued, although it is held a cashier may borrow where it is the custom of the bank, without such a resolution. The courts, however, hold a certificate of deposit to be in form and in effect a promissory note, while in fact the transaction between the bank and the depositor is a deposit of a specific sum of money. If the law is settled that such instruments are promissory notes, the bank is, in effect, a debtor to the depositor for money borrowed, and is not a debtor for deposits received.

The subject is one of importance, particularly to a bank

which issues a large amount of certificates, for if the position of the bank is that of a borrower of money upon all of its certificates issued, the report of its condition, when required to be returned to the Comptroller of the Currency or a State, must show that it is a borrower of the sum total of all its certificates of deposits at that time. Deposits and certificates are debts due, and the liability of the bank is the same in either case, but the report or statement of a bank showing a large amount of money borrowed, is in effect upon the public, very different from one showing no money borrowed. *If the courts hold that a certificate of deposit is a promissory note in effect, they must then hold that it is money borrowed by the bank and the bank can set-off such a class of liabilities as against its taxable property when assessed by the State.*

The courts holding the affirmative that certificates of deposit are nothing more than promissory notes, are:

Alabama,[1] California,[2] Connecticut,[3] Georgia,[4] Illinois,[5] Indiana,[6] Iowa,[7] Kansas,[8] Maine,[9] Michigan,[10] New York,[11] Ohio,[12] Vermont,[13] Wisconsin,[14] United States.[15]

The courts holding the negative of this question, namely, that certificates of deposit are not promissory notes, but rather receipts issued for the deposit are:

Massachusetts,[16] Pennsylvania.[17]

In the case of Patterson v. Poindexter, 40 Am. Dec. 554, rendered in 1843 by the Supreme Court of Pennsylvania, the

1 Talladega Ins. Co. v. Woodward, 44 Ala. 287.

2 Poorman v. Mills, 35 Cal. 118.

3 Kilgore v. Bulkley, 14 Conn. 362.

4 Lynch v. Goldsmith, 64 Ga. 42. 9 id. 38, 7 id. 84.

5 Laughlin v. Marshall, 19 Ill. 390, 18 id. 563.

6 51 Ind. 393, 21 id. 433, 83 Am. Dec. 358.

7 Huse v. Hamblin, 29 Iowa, 501, 1 id. 531, 488, 4 Am. Rep. 244.

8 Blood v. Northrop, 1 Kan. 28.

9 Hatch v. Dexter First Nat. Bank, 94 Me. 348.

10 Tripp v. Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Cati v. Patterson, 25 Mich. 191.

11 Munger v. Albany City Nat. Bank, 85 N. Y. 580, 60 id. 265, 48 id. 478, 19 id. 152.

12 Citizen's Nat. Bank v. Brown, 45 Ohio St. 39, — N. E. 799, 4 Am. St. Rep. 526; Howe v. Hartness, 11 Ohio St. 449.

13 Bellows Falls Bank v. Rutland Co. Bank, 40 Vt. 377.

14 Klauber v. Bigerstaff, 47 Wis. 551, 3 N. W. 357, 18 Wis. 481, 86 Am. Dec. 786, 17 Wis. 222, 15 id 304.

15 Miller v. Avisten, 13 How. (U. S.) 218; Saginaw Bank v. Western Pa. Title, etc., Co., 105 Fed. Rep. 491.

16 Shute v. Pacific Nat. Bank, 136 Mass. 487.

17 Lebanon v. Mangan, 28 Pa. St. 452; Louden Savings Fund Society v. The Hagerstown Savings Bank, 36 Pa. St. 498.

court holds that a certificate of deposit in the words and figures following, to-wit:

"I hereby certify that C. S. Tarpley has deposited in this bank (Mississippi Union Bank), payable twelve months from May 1, 1839, with 5 per cent. interest till due, per annum, $3,091.63, for the use of R. Patterson & Company, payable to their order upon the return of this certificate.

"(Signed) R. W. CLIFTON, Cashier."

is not a promissory note. That "*nothing is a promissory note in which the promise to pay is merely inferential.*"

The weight of authority so far, and at the present time, is that a certificate of deposit issued by a bank agreeing to pay to the order of a person a sum of money on demand or in the future, the time being fixed, is in effect a promissory note. *If so, it is subject to the law governing negotiable notes and bills, as to presentment for payment, protest, etc.*; and if a promissory note, and the money represented by it is money borrowed by the bank, the Statute of Limitations, which in most of the States, does not run against a deposit would run against a certificate of deposit.

Again where "statements" and "reports" are required to be made by banks to the Comptroller of the Currency, or a State Commission, such certificates under the ruling of the courts that they are in *effect* promissory notes, should be reported as they are legally defined; and held by the courts to be, namely,— promissory notes.

A promissory note represents, in all cases, an indebtedness; such an indebtedness, therefore, as previously stated, can be set-off by the bank against its taxable property when assessed by the State.

The bank cannot deny the position in relation to such certificates of deposit placed upon it by the court. If, therefore, it is estopped from denying that a certificate is a promissory note in effect, it is a loan, and the bank becomes a borrower of money; and as a result the money so borrowed or placed upon deposit must be treated as money borrowed, and is not subject to taxation as a deposit. The rule reversed: if it is declared to be money on deposit represented by such certificates of deposit and is purely a deposit, the ruling of the courts that the certificate is a promissory note is wrong.

§ 223. Statute of limitations.

In the State of California the Code of Civil Procedure (see section 348) provides that there is no limitation where money is deposited in the bank. The reading of the Statute is: "To action brought to recover money or other property deposited with any bank, banker, trust company or savings and loan society, there is no limitation."

In the case of Wells, Fargo & Co., Respondent, v. Joseph Enright, *et al.*, Defendants, Commercial and Savings Bank, Appellant, 127 Cal. 669, the court holds that where an agreement based upon a sufficient consideration is entered into between the parties agreeing to waive the limitation of a statute that it is a personal agreement, not against public policy and can be legally executed.

The court says:

"The general rule is that no contract or agreement can modify a law, but the exception is that, where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived, but, where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual. The statute limiting the time within which action shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form, by those who are entitled to it; and such waiver, when acted upon, becomes an estoppel to plead the statute." [18]

Mr. Wood on Limitations, section 76, where it is stated that if the promise to pay be made before the debt is barred and in consideration of forbearance to sue and the creditor forbears:

"It is binding upon the debtor and at least has the effect to keep the debt on foot until the statutory period dating from such promise expires either by way of estoppel or as a conditional promise to pay the debt in case the plaintiff proves it."

The law in California is that the Statute of Limitations

[18] State Trust Co. v. Sheldon, 68 Vt. 259.

does not run against a depositor of money or other property deposited with any bank, but under the ruling of the courts that a certificate of deposit is in effect a promissory note. The statute above refered to, would not apply because, in effect, it is not a deposit of money, but the bank is placed in a position as a borower of money, and, therefore, the owner of such certificate would lose his right of action under the statute, and the Statute of Limitations governing promissory notes would apply.

The law governing this question is, that where a certificate of deposit in legal effect is a promissory note, the statute of limitations runs from the date of maturity. Where a certificate of deposit does not fix the time of payment, but reads that it is payable on presentation or demand, the Statute of Limitations does not begin to run against the instrument until demand. For the instrument does not become due till demand is made.[19]

In the case of L. S. Mitchell v. J. C. Easton, Impleaded, etc., 37 Minn. 335, the court holds that, where a certificate of deposit is issued in the following form:

"Mower County Bank, Austin, Minn., March 29, 1876.

"L. S. Mitchell, Esq., has deposited in this bank seven hundred fifty and no-100 dollars, payable to the order of himself, in current bank notes, on the return of this certificate properly indorsed, with interest at the rate of ten per cent. per annum.

"Smith, Wilkins & Easton."

it is due immediately and no actual demand is necessary in order to set the Statute of Limitations running. But see Civil Code Cal., §§ 3132-3135.

Banks are accustomed to receive their own certificates of deposit as payment. They pass between banks as equivalent to cash, though they are not issued or intended to circulate as money, but, like a cashier's check or draft, they pass between persons in trade and take the place of money in commercial transactions.

19 Birch v. Fisher, 51 Mich. 36; Munger v. Albany City Nat. Bank, 85 N. Y. 580; Pardee v. Fish, 60 N. Y. 265; Bellows Falls v. Rutland Co. Bank, 40 Vt. 377.

§ 224. Interest.

The rate of interest fixed and agreed to be paid on certificates of deposit continues after maturity.[20]

If a certificate of deposit becomes payable only on presentation and demand, interest will begin to run upon said certificate after demand, at the rate prescribed by the statute of the State.

Interest on a general deposit will only begin to run against the bank from the date of the demand and refusal or failure to pay.

§ 225. Authority of banks to issue certificates.

Any banking association may issue certificates of deposit unless prohibited by statute or by provision of their charter and by-laws.

The Legislature of the State of California, assuming that a savings and loan corporation had no authority inherent to issue certificates of deposit, deemed it advisable to enact a provision of law, giving such corporation the right to issue special certificates of deposit. The provision of the statute enables the corporation bank to conduct a branch of banking, construed generally as commercial banking. The statute reads:

"Savings and loan corporations may issue general certificates of deposit, which are transferable as in other cases, by indorsement and delivery; may issue, when requested by the depositor, special certificates, acknowledging the deposit by the person therein named of a specified sum of money, and expressly providing on the face of such certificate that the sum so deposited and therein named may be transferable only on the books of the corporation. Payment thereafter made by the corporation to the depositor named in such certificate, or to his assignee named upon the books of the corporation, or, in case of death, to the legal representative of such person, of the sum for which such special certificate was issued, discharges the corporation from all further liability on account of the money so paid."

The statute gives authority to a particular kind of bank,

[20] Cordell *v.* First Nat. Bank of Kansas City, 64 Mo. 600.

namely,— a savings bank, a privilege or power which the Legislature assumed it did not or could not possess without the aid of a statute. The necessity of such a statute may be apparent, but a savings bank unless restricted by its charter or a statute is possessed with incidental and implied power authorizing it to issue certificates of deposit in lieu of passbooks, or any other lawful contract as to the receiving and repayment of deposits without the aid of a statute. National banking associations may issue certificates of deposit. There is no special statute of the United States enacted, authorizing such associations to issue certificates of deposit, but they are endowed with such incidental and implied powers, and may issue certificates without the aid of a statute.

The right to issue certificates of deposit is regarded as an incidental right to banking. The courts have never questioned or denied this right, and all banking corporations and associations throughout the United States are endowed with incidental power to issue certificates of deposit.

A certificate of deposit, when issued, is evidence of so high and satisfactory a character as to the sum therein named and deposited, that to escape its effect and the amount claimed therein, the bank must overcome it by clear and satisfactory evidence. See First Nat. Bank of Lacon v. Myers, 83 Ill. 507. It is also held by the same authority, that, where the testimony, aside from the certificate, is balanced as to the amount deposited, the certificate will turn the scale.

§ 226. Payment of certificate.

The bank must pay the certificate when due on presentation and demand, but a certificate of deposit fixing a future time of payment cannot be presented for payment before the due date, and the issuing of such a certificate is not in violation of the National Banking Act. Revised Statutes (U. S.), section 5183, reads: "No national banking association shall issue post notes, or any other notes to circulate as money, than such as are authorized by the provisions of this title." This section only applies where instruments are issued and intended to circulate as money. It does not forbid the issuing of certificates of deposit.[21]

21 William P. Hunt, appellant, 141 Mass. 515.

It must be paid to the owner. The instrument being transferable if presented for payment by a person other than the person named in the certificate as payee, the bank must, before payment, satisfy itself that the transfer and assignment is genuine; that the signature is the signature of the payee named in the certificate.

The bank is held to the same degree of care in payment of a certificate as it is in payment of checks. If it pays a forged check the money is not transferred. If the assignment on the certificate is a forgery, the true owner of the certificate can recover.

Where a bank issued a certificate of deposit in the following language —

"Samuel Stein has deposited in this bank one thousand dollars, payable to the order of himself or Ellen Stein on the return of this certificate."

"J. H. BANDEN,
"Per SMITH, *Cashier*."

The court held:

"*First*. That the certificate of deposit did not authorize the payment of the money to Ellen Stein *after the death* of Samuel Stein.

"*Second*. That notice to the paying teller of the bank of the death of S. S., received prior to the payment by him to E. S. of the amount of the deposit, was notice to the bank.

"*Third*. That if he, in making the payment after such notice, mistook the law, the bank whose agent he was must suffer the consequences."[22]

The death of either party and notice to the bank stops payment. But the bank could lawfully pay to either party during the lifetime of both and it would discharge the debt.

22 Second National Bank of Baltimore *v.* Thomson S. Wrightson, executor of Samuel Stein, 63 Md. 81.

CHAPTER XXIV.

BANK LOANS.

§ 227. Nature of loans.

The principal assets of a bank are its loans, personal and real estate. Personal loans are those where the maker of the note guarantees the payment by the act of executing the same. He thereby becomes the maker of the note, agreeing to pay the same at the place and time specified. Such an obligation is a personal agreement and does not carry with it any security of whatsoever nature or kind other than a personal obligation. But the bank may at the time of taking the note and before the transaction is closed require that the same shall be secured, and this may be done by the maker delivering to the bank personal property, and when delivered and once in possession of the bank, it can be held as a pledge until the debt is paid. The bank's claim to the security or property either becomes a general or special lien. If the property is pledged to secure a particular debt, the law generally provides that the pledge shall be sold. If the security delivered to the bank is an assigned certificate of shares of stock in a corporation, in order that the bank may hold the same free from any claims of creditors of the maker, the stock should be by the bank presented to the secretary of the corporation for transfer to the bank, either as trustee or pledgee. Until this is done, the stock is subject to attachment by creditors.

Real estate loans are those secured by mortgage. A deed made and delivered to the bank to secure a debt is in equity a mortgage and the title to the property remains in fact in the grantor, and to divest him of the title the deed must be foreclosed. As deeds in such cases are always declared to be mortgages, it is advisable in the first instance to take a mortgage.

All commercial State banks, and national banks, are duly authorized to make personal loans. Savings banks, by provision of law, may be restricted by the statute of the State wherein they may be organized in taking personal security

loans. Where the statute provides that savings banks may invest their money, or any portion thereof, in personal security loans, their business becomes more in the nature of commercial transactions. They are usually restricted by statute and are limited to making loans upon real estate security, or in the purchase of such bonds of municipal and other corporations as the law of the State may provide.

§ 228. Liabilities of any person, etc., to national banks.

Section 5200, Revised Statutes (U. S.), provides that:

"The total liabilities to any association, of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be regarded as money borrowed."

The purpose of this section is to prohibit any bank from loaning its funds in large amounts to any one person. But the rule does not apply "in the case of all discounts, and an exception is made in favor of 'bills of exchange' drawn against actually existing values." The exception also applies to "commercial or business paper owned by the person negotiating the same."

In the case of Second National Bank v. Burt, 93 N. Y. 244, the court says:

"The object of this provision of the Currency Act was to guide national banks from the hazard of loaning money in improvident amounts upon speculative and accommodation paper, but it contemplated and permitted to an unlimited amount, the discount of paper used and required in facilitating the transfer of property and money in the transaction of the legitimate business of the country."

Where a person is already an indorser on paper discounted by the bank to the full amount of one-tenth of its capital stock, it is not a violation of the banking laws to discount additional paper actually owned by him. Another ques-

tion of importance arising under this section of the statute, is, does the bank violate the provisions of the statute in making a loan in excess of one-tenth of the capital stock where such loan is secured by collaterals?

It is clear that the adding of or securing of a loan by collateral security does not enlarge the power of the bank.

The only penalty, however, which may be enforced against the bank for violation of this section of the statute, is the liability which the bank may incur of a forfeiture of its franchise, and this action can only be brought by the government.

The loan, though in excess of the amount prescribed by the statute, can be recovered in full from a borrower.[1]

Section 5201, Revised Statutes of the United States, provides that "no association shall make any loan or discount on the security of the shares of its own capital stock nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."

This section prohibits a national bank from acquiring a lien on its own stock against its stockholders, and a provision in the by-laws or in the certificate of stock, prohibiting a transfer until the liability of the stockholder to the bank is paid, is declared wholly void.[2]

It is held in Bank v. Lanier, 11 Wall. 369, that where a bank takes a pledge of its own stock which has been made to secure a deposit with another bank, the transaction is a lending of money upon the security of its stock within the meaning of the law.

Section 5137, Revised Statutes of the United States, provides that:

"A national banking association may purchase, hold, and convey real estate for the following purposes and no others:

"*First.* Such as shall be necessary for its immediate accommodation in the transaction of its business.

[1] Gold Mining Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640; Corcoran *v.* Batchelder, 147 Mass. 541; Wyman *v.* Citizens' Nat. Bank of Faribault, 29 Fed. Rep. 734; Stewart *v.* The Nat. Union Bank of Maryland, 2 Abb. (U. S.) 424; Smith *v.* First Nat. Bank, 45 Nebr. 444.

[2] Conklin *v.* The Second Nat. Bank, 45 N. Y. 655.

"*Second.* Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"*Third.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"*Fourth.* Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association or shall purchase to secure debts due to it, but no such association shall hold the possession of any real estate under mortgage or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

This section of the statute expressly prohibits a bank from making loans and concurrently with the making of such loans, the taking of real estate as security.

Real estate security can only be taken by national banks to secure a debt which has been in good faith previously contracted.

The law expressly prohibits the bank from taking real estate or any mortgage or lien thereon, as security for contemporaneous loans. The bank has no right to take a mortgage to secure a note which has been discounted at the same time.

In the case of National Bank v. Matthews, 98 U. S. 621, it is held that where

"'A.' executed a promissory note to 'B.,' and to secure the payment thereof a deed of trust of land, which was in effect a mortgage with the power of sale thereto annexed. A national bank on the security of the note and deed loaned money to 'B.' who thereupon assigned them to the bank. The note not having been made at maturity, the trustee was pursuant to the power proceeding to sell the lands when 'A.' filed his bill to enjoin the sale upon the ground that, by sections 5136 and 5137 of the Revised Statutes, the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. Held, that the bank is entitled to enforce the collection of the note by a sale of the land."

Mr. Justice Miller dissented from this opinion of the court. He says:

"I am of the opinion that the National Banking Act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction

to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands.

"The contract to pay the money and the collateral conveyance for security are separable contracts, and so far independent that one may stand and the other fall.

"In the present case, the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of money, is valid against Mrs. Matthews, personally. With this latter contract the State court did not interfere. It enjoined proceedings under the deed of trust against the land and did no more.

"Its judgment in that matter ought, in my opinion, to be affirmed."[3]

The rule is well settled that a national bank may take mortgages on real estate to secure the payment of debts which have been previously contracted.[4]

It is also held, in Howard National Bank v. Loomis, 51 Vt. 349, that the bank does not violate the statute by an agreement to renew the notes and hold the mortgage as security for the renewals.

§ 229. Restrictions against savings banks.

The express restrictions placed against savings banks, prohibiting them from loaning the money of the depositors, are those which are enumerated in the charter of the corporation or the statute laws of the State where the bank is incorporated.

Where the statute of the State expressly prohibits a savings bank association from investing the funds of its depositors on personal security loans, a loan made by the bank in violation of such a provision of the statute, is a direct violation of law, and the bank's charter may be taken away from it by the State, but no person other than the State has authority to bring suit to have its franchise forfeited; and where it has loaned money upon securities other than those enumerated by the statute, the debtor cannot defeat the debt by pleading a violation or restriction of the statute.

A statute of a State which provides that it shall be unlawful

[3] Crocker v. Whitney, 71 N. Y. 161.

[4] First Nat. Bank of Skowhegan v. Maxfield, 83 Me. 576.

for any savings and loan society or savings bank to purchase, invest, or loan its capital, or the money of its depositors, or any part of either in mining shares or stock, and which declares that if any president or managing officer who knowingly consents to a violation of such provisions, shall be deemed guilty of a felony, is held to be a constitutional law and can be enforced.

A law which forbids that any director or officer of any savings bank from directly or indirectly borrowing any of its deposits or other funds of such corporation, may provide also that the office held by any such director or officer shall become immediately vacant, if the officers borrow any of such funds.

§ 230. Power to make loans.

Where a State bank has made a loan to one person of a sum in excess of one-tenth part of its capital, and the bank is thereafter converted into a national bank, the bank may, after conversion, extend the time for payment of such loan without violating the law.[5]

Where a party is sued by a national bank for moneys it loaned him, he cannot set up as a bar its right to collect, upon the ground that the amount exceeds one-tenth of the capital paid in.[6]

Though a national bank may be restricted and prohibited from taking its own stock as security for a loan, it may take the stock of another national banking association.[7]

A national banking association may also take a pledge of personal chattels as security for a loan.[8]

It may also take as collateral security for a loan a warehouse receipt for merchandise.[9]

A national bank may also take and hold as collateral security for a loan, a locomotive.[10]

A national bank may also take a mortgage upon a stock of goods.[11]

[5] Allen v. First Nat. Bank of Xenia, 23 Ohio St. 97.

[6] Gold Mining Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640.

[7] National Bank v. Case, 99 U. S. 628.

[8] Pittsburg Locomotive & Car Works v. State Nat. Bank of Keokuk, 2 Cent. L. J. 692.

[9] Cleveland, Brown & Co. v. Shoeman, 40 Ohio St. 176.

[10] Pittsburg Locomotive & Car Works v. State Nat. Bank, U. S. Cir. Ct. 1875; Thompson's Nat. Bank Cases, 315.

[11] Spoffard v. First Nat. Bank of Tama City, 37 Iowa, 181.

While a national bank has no authority to hold or retain certain bonds coming into its possession by purchase under a contract, it has the right to hold the bonds as security for the return of the consideration paid for them, but when such an amount is returned or tendered back to it and the surrender of the bonds is demanded, its authority to retain them no longer exists.[12]

Where a stockholder borrows money from a national bank and gives as security for such loan, certificate of his shares of the bank's stock, he cannot recover when, on nonpayment of the loan the bank sold his stock and applied the proceeds of the sale to his credit.[13]

Where bonds are pledged to a national bank as collateral security for the payment of a note discounted by the bank; held, that the bank is bound to take only ordinary care of the same.[14]

When shares of stock in a private corporation are pledged as collateral security for a debt and default is made in the payment of the debt at maturity, the pledgee may file a bill in equity to foreclose the pledge by a sale under the order of the court, or he may exercise the implied power to sell without resorting to judicial proceedings, but if he elects to pursue the latter remedy, the sale must be at public auction in the absence of a special agreement, and reasonable notice must be given to the pledgor, and if he sells privately without notice, becoming himself the purchaser, the relation between him and the pledgor is not thereby dissolved.[15]

Where the debt for which a note was pledged is paid, pending an action on the note by the pledgee; held, that the latter may continue the action subject to all equitable defenses, holding the proceeds as trustee for the pledgor.[16]

Where a national bank holds collaterals as security for a debt due at a certain time, and under the terms of the contract is authorized to sell the property on maturity of the debt, the bank need not demand payment before selling.[17]

12 Logan Co. Nat. Bank *v.* Townsend, 139 U. S. 67.

13 First Nat Bank of Xenia *v.* Stewart, 107 U. S. 676.

14 Jenkins *v.* National Village Bank of Bowdoinham, 58 Me. 275.

15 Sharp *v.* National Bank of Birmingham, 87 Ala. 644.

16 First Nat. Bank *v.* Mann, 27 S. W. (Tenn.) 1015.

17 Franklin Nat. Bank *v.* Newcombe (Sup.), 37 N. Y. St. 271.

Where collateral security is held for a debt, it is the duty of the pledgee to use reasonable diligence to protect the security and see that it does not become outlawed.[18]

A bank has the power to loan money and discount notes, deducting the interest in advance.[19]

It has the power to transfer by indorsement or delivery negotiable notes.[20]

An officer of a bank who makes loans has the authority to arrange for security for the same, the security being incidental to the making of the loan itself.[21]

Commercial banks have the right to take and hold stock and bonds as collateral security.[22]

To hold the collateral or pledged property until the debt is paid.[23]

Stock of a corporation when pledged, does not become the property of the pledgee, but the title remains in the pledgor, and he has the right to vote the same at a stockholder's meeting, and is entitled to antecedently accrued dividends which have been declared on the stock. The pledgee has no title to the same under the assignment. The profits and dividends which have accrued and have been declared by the corporation and carried to the credit of the owner of the stock before assignment, cannot be claimed by the pledgee whose assignment is subsequent.

The mother bank has authority to collect the payment of any debts due the branch.[24]

A commercial State bank can receive and hold its own stock as collateral security, unless a statutory enactment intervenes, and can purchase the same at a sale to protect itself from loss.[25]

It may then sell the stock purchased at such sale and take the purchaser's note with the stock as collateral security.[26]

18 Northwestern Nat. Bank *v.* J. Thompson & Sons Mfg. Co. (C. C. A.), 71 Fed. 113.

19 Fleckner *v.* Bank, 8 Wheat. 338; Bank *v.* Collector, 3 Wall. 495.

20 12 N. Y. 223, 30 Me. 488.

21 Jennings *v.* Bank of California, 79 Cal. 323.

22 58 Me. 273, 44 Md. 47, 2 N. J. Eq. 117.

23 73 Cal. 302.

24 Smith *v.* Lawson, 18 W. Va. 212.

25 Union Nat. Bank *v.* Hunt, 7 Mo. App. 42.

26 Union Nat. Bank *v.* Hunt, 7 Mo. App. 42.

CHAPTER XXV.

BANKS BORROWING MONEY.

§ 231. National bank, extent of power.

To what extent and for what purposes can a bank borrow money? Banks are not organized for the purpose of borrowing money. It is their business to loan and not to borrow. The power conceded by some of the courts that they may borrow money for the purposes of reloaning is repugnant to banking. It is, if permitted, as a privilege, a dangerous practice and an incidental power which may be used, is only one which should be exercised with great discretion and care, and never without the expressed authority of the board of directors. If the authority of the board of directors is obtained, there can be no question raised afterward that the officers acted on their own responsibility.

That a banking corporation may borrow money is not denied, but this power is not an expressed power granted to a national bank. The statute does not enumerate this privilege and expressly authorize it. A national bank is only clothed with incidental power to borrow money. Being, therefore, only an incidental power, it is one which should only be exercised in extreme emergencies. That such emergencies may arise are not questioned. For example, when a run sets in against the bank, and it becomes necessary to meet the demand made upon it, the bank being solvent, has the implied authority to borrow money to such an extent as may (if possible) be necessary to tide the bank over.

A national banking corporation it has been held, may borrow money for the express purpose of loaning it out again in order to make a margin or profit on the interest paid and that received. It is very difficult to accept this principle or privilege as the law or authority given to national banks.

The case of National Bank of Commerce v. National Bank of Missouri, Fed. Cas. No. 18,310, broadly lays down the rule that a national bank may borrow money for the sole pur-

pose of lending the same again to others with a view to making a profit.

The case is of such importance upon this subject, it is deemed advisable to here give it in full:

Statement of facts.

"This was an action at law by the National Bank of Commerce of New York against the National Bank of Missouri, of St. Louis, which suspended in June 1877, to recover $400,000, and accrued interest, the remainder of a loan of $1,000,000, made by the plaintiff to the defendant. In 1866, James B. Eads, James H. Britton, John J. Roe, Charles K. Dickson, Amos Cotting, Barton Bates, and John A. Ubsdell, the directors of the National Bank of Missouri, borrowed $1,000,000 of the circulating notes of the National Bank of Commerce. The claim for the unpaid balance was presented to the receiver of the defunct bank and he declined to allow it, on the ground that the bank had not borrowed the money but that it was borrowed by the above-named directors and used by them for their individual benefit, and that the bank did not enjoy the advantage of the loan. An attempt was also made to show that the defendant had no right to borrow money to loan again, and that a loan of this character was illegal, and known to the plaintiff to be illegal when made. It was shown, in effect, that when the negotiations with the Bank of Commerce were opened, Mr. Eads and the other gentlemen named were not directors of the State bank, but by large purchases of the stock became possessors of a majority and elected themselves directors October 31, 1866, and that the loan was completed in the name of the bank by contract, dated December 26, 1866, by the newly-elected directors.

Testimony was given to show that the loan was made only for the use of the directors, because the bank itself had at the time $1,000,000 in cash and $680,000 in bonds on deposit with the Bank of Commerce, and it was part of the contract that this deposit should remain as security until this loan was paid.

"The testimony adduced in the case shows that the $1,000,000 loan was made by the defendant a special account entered in a book entitled 'Bank of Commerce, No. 3.' The directors gave their checks on the funds of the pool and drew out money

till it was all exhausted except $3,000, which stands to-day to their credit on the books of the suspended bank. These directors returned to the pool the amount that was paid back to the New York bank — namely $600,000 — but had paid back none of the balance of $400,000."

The opinion of the Court by Justice Dillon, Circuit Judge (charging jury):

"*Opinion.* Under the pleadings, the defendant's counsel conceded at the opening of the trial that the plaintiff was entitled to the sum of $400,000 with 6 per cent. interest, amounting in all to the sum of $445,582.10, unless the defendant established one or both of its special defences to the action, and accordingly the defendant assumed the burden of proof to make out such defences. The defendant has accordingly produced its evidence, and at its close the plaintiff's counsel moves the court for a direction to the jury that such evidence has failed to establish these or either of them, and that, notwithstanding the defendant's evidence, and all inferences which the jury can legitimately or properly draw from it, the plaintiff is entitled to a verdict.

"The defences relied on are two:

"1. That the contract of December 26, 1866, between the defendant bank and others, and which is the basis of this suit, and under which the $1,000,000 was lent by the plaintiff bank, is *ultra vires* the lawful power of the defendant bank; that is to say, that this contract was one which the defendant bank had no power, under its charter, to make under any circumstances, or, at all events, had no power to make except in case the situation and exigency of its affairs required it to borrow money, and that its situation was such that it did not need to borrow this large sum of money, or any other sum of money, and that knowledge of this fact is, by the evidence, fairly brought home to the plaintiff bank. I am of opinion that a national banking association has, under the National Banking Act (13 Stat. 99), the power to borrow money, and that the defendant bank, in the absence of fraud brought to the knowledge of plaintiff bank, had the power to enter into the contract of December 26, 1866, which is the foundation of this action. *The legal power of the bank to borrow money does not depend upon any exigency or upon the existence of a critical condi-*

tion of its affairs, or upon an actual necessity for the immediate use of the sum borrowed. It may borrow money to conduct and carry on the business of banking, and it may borrow for the express purpose of lending the same, either by discounting the notes, bills, etc., of others or on personal security, with a view to profit by the transaction. The loan of money to a national bank is not invalid because the lender may know or have reason to believe that the borrowing bank intends to lend it, when received, to others.

"A national bank may lends its money to its directors as well as to other persons, provided it acts in good faith and does not exceed the limitation to any one person or director of " one-tenth part of the amount of the capital stock of the association actually paid in." There is no claim that this limitation was exceeded in this case, as the capital stock of the bank was $3,410,000 actually paid in. If the law were that a national bank could not borrow money for the purpose of lending the same again to its directors, and that if the lender knew that such was the purpose of the borrowing bank, the transaction would necessarily be invalid. I admit that the evidence in the case is such as to justify the court to submit the question of the plaintiff's knowledge of such a purpose to the jury. But I am of opinion that where no fraud is intended, a national bank may lend its money to its directors, and the fact that the lender knows, or has reason to believe, that when the money he lends is received it will be lent to the directors, does not, unless he knows, or has good reason to believe, that a fraudulent use or disposition of it is contemplated by the directors when received, invalidate the transaction.

"The directors had no more power over the $1,000,000 obtained under the contract in suit than they had over the $1,000,000 which the defendant bank had on ordinary deposit with the plaintiff bank, or over the $3,000,000 of capital actually paid in. A lender cannot knowingly aid an intended fraud, but he is not required not to lend because the borrowing bank may misuse their powers.

"2. The second defence is that the money was procured by the defendant's directors (who signed the contract in suit professedly as sureties), not for the bank, but for their own purposes, and that they fraudulently made use of the name of

the defendant bank as principal, intending all the time illegally to appropriate the money, when received, to their own use, and that the plaintiff bank had knowledge of such intended illegal appropriation of the money. These facts, as established, would constitute a defence, but after carefully considering all of the evidence touching this matter, I think that while it would justify the jury in finding that the directors of the defendant bank, when the money was received, intended to borrow the same from the bank of which they were directors, and thus get the use of it, I can see no basis in the evidence which would justify the jury in finding that the plaintiff bank knew that the directors of the defendant bank, when the money was received, intended to make any fraudulent use or disposition of it. If the jury should so find, I shall deem it my duty to set aside their verdict, and hence there is no propriety in uselessly submitting this question to them.

"I therefore instruct you, gentlemen of the jury, that the defences relied on have failed, and that you shall return a verdict for the plaintiff."

This case is cited in full and sustains the principle and authority of the bank to borrow money for speculative purposes.

The Court says:

"*The legal power of the bank to borrow money does not depend upon any exigency or upon the existence of a critical condition of its affairs, or upon actual necessity for the immediate use of the sum borrowed. It may borrow money to conduct and carry on the business of banking, and it may borrow for the express purpose of loaning the same by discounting the notes, bills, etc., of others or on personal security with a view to profit by the transaction.*"

It may be stated that the language of the court can be easily understood. It is plain and sets forth the principle clearly. Is it the law upon this subject governing a national bank? Are the incidental and implied powers such powers which are authorized to be used without limitation, and to the extent held by the court? These questions demand a careful and impartial consideration. The common-law restriction is, that a bank *cannot borrow money except for banking necessities.* Borrowing money to reloan for a profit is not a banking necessity. The Revised Statutes of the United States, § 5136,

defining the corporate powers of a national bank, in article seven, reads:

"*To exercise by its Board of Directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, etc.*"

It will be found that no express power is here granted and that the incidental power to borrow money is derived from the language "*to exercise, etc., all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes.*"

The language used in the Statute implies that the borrowing of money must be incidental to the carrying on of the business of banking. The question reduces itself to this; — is the borrowing of money for profit and to be re-loaned for that purpose, a part of the legitimate business in banking? It is a well defined principle in banking that the borrowing of money is not an ordinary practice or occurrence usually indulged in. But the Court says:

"* * * it may borrow money to conduct and carry on the business of banking."

If money can be borrowed to carry on the business of banking in one instance, there would be no limitation in others. The principle, if authorized in one locality certainly is lawful in all others. While a bank may discern an opportunity to make a profit through its loans, it cannot loan all its funds or deposits. The Statute imposes a restriction upon it in this respect and requires that it shall retain or hold a fixed reserve.

The business of a bank is generally conceded to be conducted upon its capital, deposits, surplus and reserve fund; and the investment or loaning by the bank of a greater portion of these sums than the law specially provides may be loaned, is a violation of law, and this act is immediately called into question by the Comptroller of the Currency. It is the business of the bank to use all its capital and deposits permitted to be used by law, to the very best advantage possible by loaning the same under the restrictions of the law. This is carrying

on the business of banking and conducting it within the law and to the limit of its privileges.

Money borrowed by a bank for purposes of profit, and to be re-loaned again, is not an ordinary power or privilege. Bankers deem such an act, if practiced or permitted, as dangerous, directing danger. Where an exigency does not arise and money is borrowed, it is a privilege purely speculative; and this power should be denied to banking corporations, both national and State.

They are permitted in the exercise of such acts only as are necessary in the due attainment of their objects, and consequently can perform no acts, enter into no contracts or transactions, and incur no liabilities but such as spring out of, or are otherwise incidental to the purpose for which they are created.[1]

That a banking corporation is endowed with, and has implied power to borrow money is not denied. But it is a broad construction of the statute to hold that a banking corporation is organized for and has the authority of borrowing money to speculate on. If it could borrow money to carry on and conduct the business of banking, the paid-up capital would not be a necessity. A bank is organized for the purpose of receiving money on deposit, keeping the deposits safely, investing them in loans allowed by law and enumerated by the statute, and returning the money to depositors when demanded.

It is held that the broadest implied power given to a bank is, that a corporation does not exceed its corporate powers by entering into such obligations or contracts absolutely essential for its purposes and for the transaction of its *ordinary* affairs.

The Supreme Court of the United States has not laid down any binding rule upon the question, but has decided such cases coming before it upon the law and the facts surrounding the case. The court does not sanction the doctrine laid down in the case of National Bank of Commerce v. National Bank of Missouri, Fed. Cas. No. 18,310, which authorizes national banks *"to borrow money to conduct and carry on the business of banking."* This rule seems very broad. If this is the law, it would give the bank such latitude as would lead to serious abuses and results.

[1] Brice ultra vires, p. 28.

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The case of First National Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 127, raises the question indirectly and disposes of the general question as to the implied and incidental powers of a bank in the following language:

"Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. *This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.* Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this behalf, whatever natural persons could do under like circumstances."

The question of the power of the bank to borrow money was not the direct question before the court in the case above cited; but the court in this case emphasizes the law and incidental powers of a bank, to be only those which necessarily may be used to carry out the express powers and incidental powers necessary to carry on the business of banking.

In the case of The Western National Bank v. Armstrong, 152 U. S. 346 (appeal from the Circuit Court of the United States for the Sourthern District of Ohio), the question of borrowing money and power of a national bank to do so is directly discussed by the court.

The opinion of the court in this case is as follows:

Mr. Justice Shiras, delivering the opinion of the court, says:

"Whether the transaction of May, 1887, was a discount by the Western National Bank of New York in favor of E. L. Harper of the four notes made by A. P. Gahr and indorsed by Harper, or was a loan by said bank to the Fidelity National Bank, is the question principally discussed in the briefs and oral arguments of the respective parties.

"In disposing of the case we are not assisted by any findings or opinion by the court below, and we are left to conjecture the grounds upon which that court proceeded in dismissing the bill of complaint.

"The theory that the case was that of a single discount by the New York bank of four promissory notes, made by Gahr and indorsed by Harper, and secured by the assignment by Harper of certificates of 1,600 shares of the stock of the Fidelity National Bank, comports with the form of the notes themselves. Such a transaction would have been an ordinary one, and in the course of the usual business of such a bank. The letter of May 16, 1887, in which the proposition was made to the New York bank to make the loan, was signed by E. L. Harper in his own name, without any official designation. That the $200,000 were placed on the books of the New York bank to the credit of the Ohio bank was not inconsistent with this version of the case, because it appears that this was done at the request of Harper.

"On the other hand, it is claimed that because the letter of May 16, 1887, was written on the letter paper of the Fidelity National Bank, and because the proceeds of the discount were placed to the credit of the Ohio bank, and were drawn out by drafts of that bank, the transaction was thereby shown to have been made on behalf of the Ohio bank. And C. N. Jordan, vice-president of the New York bank, testified that he understood the proposition to come from the Ohio bank for a loan to it, and that he would not have submitted the matter for approval to the board of the New York bank had he not so understood it.

"There are other features of the correspondence that are pointed to by the parties as making for their respective contentions. It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a con-

cession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount.

"There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that 'Harper was the vice-president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf.' The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general book-keeper of the Fidelity National Bank, on cross-examination, wherein he stated that E. L. Harper was the vice-president and managing officer, and that by 'managing officer' he meant that Harper was 'the general manager of the business of the bank.' No such office as that of 'general manager' is known or named in the National Bank Acts, nor does any such office exist by usage. The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time.

"It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the National Bank Act (Rev. Stat., p. 5136, par. 7). A national bank can 'exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security, and by obtaining, issuing, and circulating notes.'

"The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to

get its own notes discounted. Still, as was said by this court, in the case of First National Bank v. National Exchange Bank, 92 U. S. 122, 127, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.'

"Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. *Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.*

"Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who had power to do the act in the first place; that is, in the present case, the board of directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity National Bank, by any act, formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction.

"It is true that a corporation may become liable upon contracts assumed to have been made in its behalf by an unauthorized agent by appropriating and retaining, with knowledge of

the facts, the benefits of the contracts so made on its behalf. But there is no room for such a contention in the present case. The money advanced by the New York bank was, indeed, at Harper's request, placed to the credit of the Ohio bank, but it was shown that it was withdrawn partly by Hopkins, the assistant cashier, and partly by Harper himself, by drafts in the name of the bank, but that the moneys thus drawn never came into the actual possession or use of the bank. The moneys were appropriated by Harper to his own use, or, at all events, it does not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction. The mere placing of the money in the name of the Ohio bank involved no ratification by the bank unless it was so placed with their knowledge and assent, nor did the withdrawal of the money by drafts drawn by Harper or by his direction in the name of the bank, constitute a receipt by the bank of such money, unless it was in point of fact, received and used by the bank or for its benefit. Not this, but the contrary was shown.

"So far, then, as the case of the plaintiff in error depends on the alleged loan of money to the Fidelity National Bank, we find no error in the decree of the court below in dismissing the bill.

"This brings us to the consideration of the other phase of the case, namely, that which arose on the claim of the New York bank as the holder of 1,600 shares of the stock of the Fidelity National Bank, transferred to it as security by Harper, to be subrogated to the supposed right of Harper to be repaid the moneys paid in by him on account of his subscription for an increase of stock, not voted for by the stockholders, and not approved by the Comptroller of the Currency.

"The court below sustained the demurrer to this portion of the bill. Two grounds were asserted in the demurrer — one, the insufficiency of parties, in that neither the Fidelity National Bank nor Harper were made parties; the other, that of multifariousness. It is now contended before us that Harper was not a necessary party because, as is averred in the bill and admitted by the demurrer, he had pledged and assigned this stock to the complainant bank, and it is argued that the bank thereby became vested with whatever rights Harper had to

have his money returned to him as a special deposit. It is also contended that asserting such a right of subrogation is so far within the equities of the bill, and so necessary an incident of the transaction, as to relieve the bill of the charge of being multifarious.

"It is not easy to see why, if the complainant were really entitled to be subrogated to the rights of Harper in respect to the hypothecated stock, such a claim might not be set up in the same bill in which it seeks to be allowed, as a lender of money to the Fidelity National Bank, to participate in the payments made by the receiver.

"But, however that may be, it seems to us that Harper, having procured an issue to himself of certificates of paid-up stock, was in no position, when the bank became insolvent, before the necessary steps to legitimatize the increase of stock had been taken, to demand back his money, as if it were trust money, or constituted a preferred claim against the assets of the bank in the hands of the receiver. The utmost that he could claim would be to be treated as a general creditor, and entitled as such to participate in the payments made by the receiver.

"In the case of Winters v. Armstrong, Armstrong v. Stanage, 37 Fed. Rep. 508, which was the case of a suit by the receiver of the Fidelity National Bank to recover, from a subscriber to the preferred increase of stock of that bank, the amount of a promissory note given in payment of such subscription, it was held by Mr. Justice Jackson, then circuit judge, that, as the necessary steps had not been taken to legitimatize such increase of stock before the bank became insolvent, there was a failure of consideration, and the receiver could not enforce payment of the note. We, however, agree with the court below in thinking that such a question could not be raised in the present case, to which Harper was not a party. Harper had paid in the full amount of his subscription, and had procured the issue to himself of certificates for his stock, and had parted with the legal title to the stock by transferring the certificates to the New York bank. In such circumstances it might be claimed with some appearance of justice, that Harper and his transferee were precluded from opening up the transaction and procuring a recission of the subscription. If that were so,

the holder of such stock, whether Harper or the New York bank, might have been compelled to contribute to the payment of the indebtedness of the insolvent bank.[2]

"So, too, even if it were held that Harper was not precluded from surrendering his stock and recovering back the money paid on account of it, it might yet be made to appear that Harper, if he were answerable for the mismanagement which resulted in the bank's insolvency, could not, in a court of equity, and as against the creditors of the bank, recover back his subscription money. But it is plain that such questions as these could not be adjudicated in the absence of Harper as a party, and we therefore think the court below did not err in sustaining the demurrer for that reason.

"Upon the whole, we are of the opinion that the decree of the court below, in sustaining the demurrer, and in dismissing the bill, should be affirmed."

The court does not here expressly hold that the transaction was a loan, but says that:

"* * * It may be conceded that the New York Bank acted upon the theory that the loan was to the Ohio Bank, and took the notes and certificates of stock as collateral."

And further says:

"* * * But the liability of the Ohio Bank is not a necessary consequence of such a concession."

The court further says, in laying down the principle of an executive officer of a bank as to his power and authority to contract indebtedness:

"* * * The most that can be claimed in this case, is, that Harper acted as principal executive officer of the bank. It cannot be pretended as such that he had power without authority from the board, to bind the bank by borrowing $200,000 at four months' time."

And further says:

"* * * It might even be questioned whether such a transaction would be within the power of the board of directors."

The court here cites Revised Statutes U. S., section 5136. It then proceeds to lay down the principle of restrictions upon

[2] National Bank v. Case, 99 U. S. 628.

a bank to borrow money or give notes, as the privilege is not expressly provided for under the statutes.

The court says:

"*The power to borrow money or to give notes is not expressly given by the act. The business of a bank is to lend, not to borrow money; to discount the notes of others, not to get* its own notes discounted."

The last quotation is thrown into italics to enforce the fact that the court has not bound itself by a general rule, and laid down the doctrine to be that a national bank can borrow money under any and all circumstances, for the purpose of carrying on and conducting a banking business. The court proceeding, then cites from its former opinion in the case of First National Bank v. National Exchange Bank, 92 U. S. 122, 127, which has previously been quoted. The court then proceeds and lays down the principle that circumstances may arise when a bank would be justified in becoming a temporary borrower of money, and uses the following language:

"*Nor do we doubt that a bank in certain circumstances may become a temporary borrower of money, yet such transaction would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow the money.*"

This quotation is also thrown into italics to enforce the fact that the court has reserved itself, and does not authorize the principle or privilege of a bank to borrow money to carry on the business of banking, but holds that certain circumstances may arise when the bank would be justified in borrowing money.

The power to borrow money by discounting notes is again discussed by the Supreme Court in the case of Auten v. U. S. National Bank of New York, 174 U. S. 125–143. The syllabus of this case is as follows:

"In June, 1892, the United States National Bank of New York, by letter, solicited the business of the First National Bank of Little Rock, Arkansas. The latter, through its president, accepted the proposition, and opened business by enclosing for discount, notes to a large amount. This business continued for some months, the discounted notes being taken up as maturing, until the Arkansas bank suspended payment, and

went into the hands of a receiver. At that time the New York bank held notes to a large amount, which it had acquired by discounting them from the Arkansas bank. These notes have been duly protested for non-payment and the payment of the fees of protest made by the New York bank have been charged to the Arkansas bank in account. The receiver refused to pay or allow them. At the time of the failure of the Arkansas bank there was a slight balance due it from the New York bank, which the latter credited to it on account of the sum which was claimed to be due on the notes after the refusal of the receiver to allow them. The New York bank commenced this suit against the receiver to recover the balance which it claimed was due to it. The receiver denied all liability and asked judgment in his favor for the small balance in the hands of the New York bank. It was also set up that the notes discounted by the New York bank were not for the benefit of the Arkansas bank, but for the benefit of its president, and that the New York bank was charged with notice of this. The judgment of the trial court, which was affirmed by the Circuit Court of Appeals, was for the full amount of the notes, less the set-off. In this court motion was made to dismiss the writ of error on the ground that jurisdiction below depended on diversity of citizenship, and hence was final. Held:

1st. That the receiver, being an officer of the United States, the action against him was one arising under the laws of the United States, and this court had jurisdiction.

2nd. That it was competent for the directors of the Arkansas bank to empower the president or cashier, or both to indorse the paper of the bank, and that, under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized and were executed as authorized.

3rd. That the set-off having been allowed by the New York bank in account, the receiver was entitled to no other relief.

It should be noticed that the First National Bank of Little Rock was not a direct borrower from the New York bank. The New York bank was its correspondent, and, as is the usual custom, accepted the Little Rock bank notes executed to it in the usual course of business, and these notes were forwarded

to the New York bank and by it discounted. The Little Rock bank afterwards failing, was placed in the hands of a receiver. It was found that there was a balance due the New York bank upon notes which it had discounted for the Little Rock bank, which had not been paid. The receiver denied the liability and claimed the notes were not discounted for the benefit of the Little Rock bank, but for the benefit of the president, and that the New York bank was charged with notice of this. But the facts showed that the transactions were authorized by the directors and the judgment was in favor of the United States National Bank.

There is nothing in this case to show that the Little Rock bank borrowed money on demand or on time, by executing its note for the purpose of conducting or carrying on the business of banking; but it was discounting notes which is usual in the transactions of banking.

The usual and customary transactions of banking and those which occur daily between banks, such as discounting and re-discounting notes, comes within the legitimate powers of banking.

This may be called "borrowing and loaning money," and such transactions which occur daily and hourly between banks are not characterized as unlawful acts. But there is a wide difference between such common and usual transactions, and those which are unusual and out of the ordinary. As, for example, the borrowing of money to conduct and carry on the business of banking for the purpose of profit. Discounting and re-discounting notes is specially provided for and allowed by the statute and is an ordinary transaction as before stated. But borrowing money is an unusual, extraordinary necessity seldom resorted to, and should not be allowed to be abused, and only used in cases of exigency and under critical conditions which may arise from the business of banking.

The court in discussing the subject generally, says:

"The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require; and it may be done by re-discounting the bank's paper, or by some other power of borrowing money."

The court further says:

"A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of the usual course of business; and to charge everybody connected with it with knowledge that it may be in excess of authority, it would seem if doubtful, more like a *question of fact* to be solved in the particular case in the usage of the party or the usage of the community."

The court here again leaves such cases to be determined upon the facts, usage of the parties or the usage of the community where they may arise.

The question of power of a national bank to borrow money was again brought before the Supreme Court of the United States in the case of Aldrich v. Chemical National Bank, 176 U. S. 618, where this case and Western National Bank v. Armstrong, 152 U. S. 346 is distinguished. The court in its opinion says:

"We have then, a case in which a national bank having used in its business, money which a vice-president obtained as a loan from it to another national bank, denies all liability to account for the same upon the ground that the loan was not negotiated by it or by its directors, as well as upon the ground that it could not itself have legally borrowed the money from the other bank.

"Do the statutes relating to the National Banking Association require that such a defense be sustained? This question is recognized by the court as one of great importance and has received careful consideration in the light of adjudicated cases. We proceed to the further examination of these cases."

The court, citing many cases, then concludes its opinion in the following language:

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice-president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank having enjoyed the fruits of the transaction cannot avoid accountability to the New York bank, even if it were true as contended that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the

money. When, as the result of its arrangement with Harper as vice-presendent, the Chemical Bank credited the Fidelity Bank on its books with the sum of $300,000, the former thereby undertook to pay the checks of the latter to the extent of that credit. And, as already stated, that credit was fully exhausted by the payment of the checks of the Fidelity Bank drawn in the ordinary course of its business. If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank by its check upon the Chemical Bank, had drawn the whole $300,000 at one time and now has the money in its possession unused? It would not be allowed to hold the money even if it were without power under its charter to have borrowed it from the Chemical Bank for use in its business.

"Or suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it, a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business and for its benefit, money obtained by one of its officers from another bank under the pretence of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank, the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing.

"If the Fidelity Bank did not itself borrow this money from the Chemical Bank, although the latter bank in good faith believed that it did, then the crediting of the former on

the books of the latter with $300,000 was a mistake of which the Fidelity Bank was not entitled in equity and good conscience to take advantage, and from which it should not be permitted to derive profit to the prejudice of the other bank. So, if the Fidelity Bank took the benefit of that credit with knowledge of all the facts, then its defence is without excuse and immoral If it innocently availed itself of that credit without knowledge of the facts, the principles of natural justice demand that it be held accountable for the money of another bank which it used in its business without giving any consideration therefor.

"The fact that, after the Fidelity Bank had been credited on the books of the Chemical Bank with the $300,000, Harper fraudulently caused himself to be credited on the books of the Fidelity Bank with a like sum, is a matter with which the Chemical Bank, had no connection and cannot affect its right to demand a return of the money which went (as the Chemical Bank in good faith supposed it would) into the treasury of the Fidelity Bank and was by it used in meeting its obligations. The dishonesty of Harper in his management of the affairs of the Fidelity Bank, did not discharge that bank from the obligation under which it came, by using in its business the money obtained by its vice-president under the guise of a loan to the bank.

"It is no defence to the claim of the Chemical Bank to say that the directors of the Fidelity Bank were unaware of the fraudulent acts of Harper. We do not rest our conclusion in the present case, upon any question as to diligence or want of diligence upon the part of the directors. We rest it upon the fact and the implied obligation arising therefrom that the Fidelity Bank used in its business and for its benefit, the money which the Chemical Bank placed to its credit in consequence of a loan negotiated by Harper, who assumed to represent it. *Independently therefore of any question as to the scope of the power of a national bank to borrow money to be used in its business, we hold that the Fidelity bank became liable to the Chemical Bank by using the money obtained from the latter, under the arrangement made by Harper in his capacity as vice-president; consequently, the decree recognizing the claim, of the Chemical Bank for the amount of the loan of March, 1887, was right.*"

This is an adjudication of the question to the present time and it may again be stated that the court decides this case independentlly of the question *as to the scope of the power of a National Bank to borrow money to be used in its business;* not declaring that a national bank cannot borrow under certain circumstances, nor establishing a precedent that it may do so as an ordinary power and that such a power is an incident to the bank. The court decides that the Fidelity Bank became liable because it obtained money from the Chemical Bank and used it in its business, and that the mode of obtaining the money, while not regular upon its face, the bank received it, deriving a benefit from its use and should therefore be required to pay it back.

A national bank may then borrow money to an extent not to exceed its capital paid up, when duly authorized by its directors, and this may occur as an ordinary transaction in the course of rediscounting notes personally made to it in the ordinary course of business, and such transactions may be performed by the duly appointed and authorized officers. But the borrowing of money by executing the note of the bank to bring it within the power of the corporation, the transaction not being authorized by statute, nor a customary or an ordinary or usual one, *an exigency should exist, and the transaction should be authorized by the Directors at the time.* If not, it should afterwards be ratified by them.

The rule that a National Bank can borrow money for the express purpose of re-loaning it again for profit or speculation, seems too broad. Borrowing money is only an incidental power not being expressly authorized, and therefore should not be exercised as an express power.

The power to borrow money is not expressed and authorized by the statute because evidently it was considered a dangerous privilege and one that would be abused. And for the further reason the power is not authorized, because it is not considered a part of the ordinary business of banking. The transactions are considered so much outside of the general scope of the bank's power, that the officer acting in behalf of the bank should, in each case, have special authority.

§ 232. State banks borrowing money.

State banking corporations being creatures of the law, their powers and rights are derived from the Constitution and statutes of the various States under which they are incorporated. They have only such powers as are granted to them by constitutional and legislative authority, together with such implied powers as are necessary to put into execution and use those powers which are expressly enumerated in the law, and set forth in their charter.

A banking corporation is an artificial person when incorporated under the general laws of a State, and may be endowed with capacity to enter into any obligation or contract essential for its purpose, and for the transaction of its ordinary affairs. The statute may give it power to issue evidences of debt; to borrow money to carry on the business for which it was incorporated, and this right may be used although not reserved by its charter.

As has been stated, banking corporations are not incorporated for the purpose of borrowing money to speculate in business. It is their purpose rather, to receive on deposit and to loan money. The power of borrowing money by a State bank, where not specially authorized by statute or by the bank's charter, is governed by the same law and rules that govern national banks and should be limited to cases of extreme emergency. Such an emergency can only arise where funds are required to meet the urgent and unexpected demands made on the bank.

In the case of Tuttle v. National Bank of the Republic, 48 Ill. (App.) 481, the court says:

"It has been suggested that the debt was incurred without lawful power on the part of the Edwards County Bank, in whose charter there is no specific authority to borrow money; but we understand that is an incidental or implied power possessed by banking corporations generally, unless especially denied or restricted.

"Of course it is not a part of the continuous practice of any bank to borrow, but it is often necessary in the reasonable exercise of express power, and hence it is usually regarded as a necessary incident. Aloise on Banks and Banking, section 63. Certainly the borrowing must be incidental to the usual

and legitimate business of a bank, otherwise the act is *ultra vires;* but it is not apparent that there was anything extraordinary or illegitimate in this loan.

"Other questions suggested in the briefs need not be discussed, as in the view we are inclined to take of the case, the foregoing considerations require us to affirm the judgment."

The court sustains the reasonable rule that, the borrowing of money is always lawful under a power *expressed;* but where the power is used as an incidental power, it must only be used in the usual and legitimate business of banking. And this business is not the borrowing of money to speculate on.

The Supreme Court of the State of Indiana, in the case of James, Administrator v. Rogers, 23 Ind. 451, in discussing the power of a banking corporation to issue promissory notes, says:

"No corporation has authority to issue its promissory notes, except, as it received such authority through its charter, either expressly conferred, or as an incident to the purpose for which it was created."

In New York, in the case of Coats v. Donnell, *et al*, 94 N. Y. 168, the court, in discussing the powers of a bank through its cashier to borrow money, says:

"There can, we apprehend, be no serious doubt of the proposition that the agreement of June 10, 1878, was one which the cashier of the bank was authorized to make, *first*, as incident to his office of cashier, in the absence of any special authority to enter into the particular transaction, and *second*, by reason of the by-laws of the bank defining the authority of the cashier, which declares that "he shall have the immediate charge and supervision of the bank; shall attend to the making of loans, discounts and other active business transactions of the bank, exercising his own judgment as to all such matters, when not otherwise directed by the finance committee or board of directors." The drafts in question, were drawn and negotiated for the purpose of procuring money for the use of the bank and to enable it to carry on its legitimate and usual business. The cashier of a bank is its executive officer, and it is well settled that as incident to his office, he has authority, implied from his official designation as cashier, to borrow money for, and to bind the bank for its repayment,

and the assumption of such authority by the cashier, will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction, and deal with him upon the basis of its existence.[3]

The negotiation of the drafts in this case by the cashier, was within his authority. The power to borrow being admitted, the power to secure the loan by pledge of the property or funds of the bank (in the absence of any statutory restraint), in the ordinary course of business, would seem to be a necessary inference from the primary powers, and this is recognized in the cases to which we have referred. *The exigency of the bank when the agreement in question was made, rendered it of the utmost importance to its interests to prevent the protest of the drafts, and the authority of the cashier to make the agreement of June* 10, 1878, *giving to Donnell, Lawson & Co., a lien upon any deposit in their hands, for their security, if at all doubtful, irrespective* of the by-laws, was ample under the comprehensive grant of authority thereby conferred."

The authority to borrow money, while generally recognized, in the opinion of the court in the above case, was authorized because it was a necessity.

Where a run threatens the bank or its drafts are liable to go to protest, its cashier has the power when authorized by the directors to temporarily borrow money to pay depositors or to protect the credit of the bank.

Where the statute of a State restrains a banking corporation, prohibiting it from borrowing money, its officers have no authority, impliedly or otherwise, to enter into such contracts.

A bank may, by statute, be prohibited from borrowing money of another bank, payable at a future day certain.[4]

Where the Constitution or the statute of a State provides that a corporation shall not create a debt in excess of its capital paid up and where a banking corporation derives all its authority through incorporation under such general laws, the directors have no authority to create a debt in excess of its paid up capital.

3 Curtis *v.* Leavitt, 15 N. Y. 9, Barnes *v.* Ontario Bank, 19 id. 152.

4 Commonwealth *v.* Bank of Mutual Redemption, 4 Allen (Mass.) 1.

CHAPTER XXVI.

BANKS DEALING IN STOCKS AND BONDS.

§ 233. National banks, power limited.

A national bank has no power to deal as an agent in stocks and bonds. It is also prohibited from buying or selling them upon commission. Such transactions and operations are not deemed incidental to the national banking business.

A national bank has no charter, statutory or incidental powers to act as a broker or agent in the purchase of bonds and stocks.

Mr. Justice Mercur, in Bank of Allerton v. Hoch, 89 Pa. St. 324, says:—

"It is a well recognized law, that a national bank is not, by its charter, authorized to act as a broker or agent in the purchase of bonds and stocks. Its specified powers given by Statute nor its incidental powers necessary to carry on the business of banking, do not extend to the transaction of such business.[1]

When the paper on its face shows the transaction not to be within the usual course of business of the bank, it is not binding on the bank, although signed by the president thereof, as such officer. He is the executive agent of the board of directors within the ordinary business of the bank, but cannot bind it by a contract outside thereof, without special authority. I do not understand these general rules to be denied."

The power to deal in stocks is not expressly prohibited by the Statute, but such a prohibition is implied from the failure to grant the power.

The Supreme Court of the United States, in the case of First National Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, holds that a national bank may accept stock in payment and satisfaction of a doubtful debt, with a view to a subsequent sale or conversion into money of said stocks so as to make good or reduce an anticipated loss.

1 First National Bank of Charlotte *v.* Exchange Bank, 2 Otto (U. S.) 122; Fowler *v.* Scully, 22 P. F. Smith, 456.

The Court says:

"Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in Fleckner v. Bank of the United States, 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due, was decided not to be a "dealing" in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices."

A National bank has incidental power to loan money on personal security and accept stock of another corporation as collateral, and thus becomes subject to liability as other stockholders.

In the further discussion of this subject, the Supreme Court of the United States, in California Bank v. Kennedy, says:

"The Federal questions which therefor arise on the record may be thus stated:

"*1st.* Do the Statutes of the United States, Rev. Stat. p. 5136, *et seq.*, relating to the organization and powers of national banks, prohibit them from purchasing or subscribing to the stock of another corporation?

"*2d.* If a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?

"*As to the first question.*—It is settled that the United States Statutes relative to national banks, constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or

which are incidental to carrying on the business for which they are established.[2]

"No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee, it may become the owner of the collateral and be subject to liability as other stockholders.[3]

"So also, a national bank may be conceded to possess the incidental power of accepting in good faith, stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

Where a national bank takes by purchase, stock in another corporation, the law is settled that the corporation may plead its lack of power. The act is an *ultra vires* act.[4]

The Revised Statutes of the United States, § 5201, provides that national associations must not hold their own stock, taken as security for a debt beyond a period of six months.

The Court says, in discussing this question, and in analyzing said section:

"So, while a bank is expressly prohibited from loaning money upon, or purchasing its own stock, special authority is given for the acceptance of its shares as security for and in payment of debts previously contracted in good faith; but all shares purchased under this power must be again sold or disposed of at private or public sale, within six months from the time they are acquired."

The law is well settled that a national bank has power to take evidences of debt from its customers and other persons,

2 Logan Co. Bank *v.* Townsend, 139 U. S. 67, 73.

3 National Bank *v.* Case, 99 U. S. 628.

4 California Bank *v.* Kennedy, 167 U. S. 362; Thomas *v.* Railroad Co., 101 U. S. 71; Pennsylvania Railroad *v.* St. Louis, Alton, etc., Railroad, 118 U. S. 290; Oregon Ry. & Nav. Co. *v.* Oregonian Ry. Co., 130 U. S. 1; Pittsburgh, Cincinnati, etc., Railway *v.* Keokuk & Hamilton Bridge Co., 131 U. S. 371; Central Transp. Co. *v.* Pullman's Car Co., 139 U. S. 24; St. Louis, etc., Railroad *v.* Terre Haute & Indianapolis Railroad, 145 U. S. 393; Union Pacific Railway *v.* Chicago, etc., Railway, 163 U. S. 564; McCormick *v.* Market Nat. Bank, 165 U. S. 538.

and send them to distant places for collection and pay over the proceeds when collected to the person entitled thereto; retaining or receiving, in some form, a compensation for its services rendered.

The bank, therefore, may enter into an agreement with a customer to exchange for him, non-registered United States bonds for registered bonds.

The Court says:

"The exchange of the bond would, in a broad sense, have been a negotiation of them. It would, as commonly understood have been a legitimate business for a bank to do. We may take judicial notice of the fact that government bonds are usually bought and sold through banks; and that all the transactions in reference to them with the government, are usually conducted through banks and persons doing banking business. They are moneyed securities, and the collection or exchange of them, is a financial transaction in no sense foreign to the business of banking."[5]

A national bank can properly and legally engage in the business of dealing in and exchanging government securities.[6]

The State courts universally endorse the principle that national banks have the incidental power to deal in government bonds, receiving them on deposit, being of one class, and exchanging them for those of another class.

The Supreme Court, in the case of Leach v. Hale, 31 Iowa 69, says:

"We think the bank, under the provisions of the Act above cited, was clothed with authority to pursue either course in order to convert the bonds of its customers."

§ 234. Liability of national bank holding stock as security.

The Supreme Court of the United States, in the case of National Bank v. Case, 99 U. S. 628, states the law as established, "that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the *owner of the stock,* is liable as stockholder for the benefit of creditors."

5 Yerkes *v.* National Bank, 69 N. Y. 382.

6 Cornelius M. Van Leuven, Respondent, *v.* The First Nat. Bank of Kingston, Appellant, 54 N. Y. 671.

§ 235. Commercial and savings banks dealing in stocks and bonds.

All commercial and savings banks organized under State laws have the incidental power to deal in stocks, bonds, etc., unless specifically restricted by the Statute. They may purchase stocks of another corporation, buy and sell the same as individuals may do. But where the Statute of a State prohibits a banking corporation from investing in stocks or bonds of a particular class, they have the incidental and implied power, whether authorized by law or not, to deal in all other stocks and bonds; to buy and sell notes and securities of like nature.

The right of a State banking corporation to deal in stocks, directly or indirectly, in buying or selling, where the power is not restricted by Statute, is held to be a common-law right. It is a power incident to every corporation.[7]

The power *to buy and sell* stocks and bonds should not be construed as a right to *traffic* in them. A bank may buy such securities as an investment for the purpose of investing the surplus fund it may possess. To *traffic* in such security, that is, buy and sell with a view to an anticipated advance in price, is a violation of the principle of legitimate banking. A bank has no authority, incidental or otherwise, to speculate in securities. Its investments and dealings should always be made with a view to profit, safety, and security.

Where a Statute does not intervene and prohibit a bank from taking its own stock as security for a debt contracted, it may take and hold the same as security for such debt; and on failure to pay, it may proceed to sell the stock and may buy the same, and after purchase, sell the stock and take the purchaser's note in payment therefor.

[7] Farmers and Mechanics' Bank *v.* Champlain Transp. Co., 18 Vt. 131.

CHAPTER XXVII.

BANK DISCOUNTS.

§ 236. Power to make, vested in directors.

The power to discount notes is one which is vested exclusively in the board of directors.

It is a power which cannot be delegated by them and given over without reserve to an officer or agent of the bank. The execution or the doing of the act may be performed by an officer of the bank, but the authority and direction arises and comes from the board of directors.

The board of directors, it is held, may, by a single resolution, passed by them, give the power to a financial officer of the bank, with general authority to make discounts.

Again it is held, that such a resolution must designate the person or persons to whom the loans are made. As all loans must be made by direction and under the authority of the board of directors, it is questionable whether a general resolution directing a financial agent of a bank to make loans, would give him the power to do so.

This power, however, and privilege is by a very great number of the banks, assumed by the president or cashier, and the business of making discounts is entirely left with them without any direction or authority whatever.

Banking corporations, both State and national, are clothed with the power to rediscount bills receivable. A rediscount is the taking of a note which has been duly executed to the bank, calling for a certain sum of money, payable at a future date, which note is by the bank indorsed either with or without recourse to another bank or person.

A rediscount by a bank of its bills receivable, though it indorses the same by a general indorsement only becomes contingently liable for the payment, and it is not a borrowing of money by the bank; but has more the characteristics of a sale.

The right of a bank to discount and "re-discount" paper cannot be questioned.

The Federal Court, in the case of the United States National Bank v. First National Bank of Little Rock, 79 Fed. Rep. 296, holds that an officer of a bank has the authority to indorse negotiable paper owned by the bank; and that such transactions come within the ordinary transaction of the business of the bank. Such transactions are of hourly occurrence in all banks located in large business centers.

The court says:

"There is an obvious difference between a transaction where a bank goes into the market as a borrower, giving its own notes, bills or other obligations for the money borrowed, and a transaction where it disposes of the notes and bills of third parties which it has previously discounted. In the former case, it becomes primarily bound; it is the principal debtor; while, in the latter case, if it indorses the paper, it only incurs a *contingent liability* which may never ripen into an absolute obligation to pay. The latter transaction has more, if not all of the characteristics of a sale, and it is generally regarded as a sale whereby assets of a certain kind are converted into cash, * * * but we can see no propriety in characterizing the transaction as a borrowing of money, when a person or corporation sells commercial paper made by third parties, which they happen to own."

The court, in further discussing this subject, says:

"We think the weight of reason and authority is in favor of the view that it is within the scope of the implied power of the president of a bank to indorse negotiable paper in the ordinary transaction of the bank's business; and that a special authority to that end need not be conferred by the board of directors. Such implied power is generally conceded to the bank cashier, and we know of no sufficient reason why the implied power of the chief executive officer of a bank should be more limited in this respect than those of its cashier." [1]

The rule laid down and announced by the court, in the case of the Western National Bank v. Armstrong, 152 U. S. 346, that the president or cashier of a national bank is devoid of

[1] Bank *v.* Smith, 23 C. C. A. 80, 77 Fed. 129, 135; Fleckner *v.* Bank, 8 Wheat. 338, 360; Wild *v.* Bank, 3 Mason, 505, Fed. Cas. No. 17,646; Bank *v.* Perkins, 29 N. Y. 554, 569; Cooke *v.* Bank, 52 N. Y. 96; Bank *v.* Wheeler, 21 Ind. 90; Merchants' Bank *v.* State Bank, 10 Wall. 604, 650.

power to borrow money or re-discount notes unless duly authorized to do so by the board of directors, it is claimed does not apply where a general usage is shown between correspondent banks.

This rule can be supported on no other theory than that the usage and custom was condoned and acquiesced in by the directors.

It is interesting in this connection, to read the opinion of the court in the case cited, namely the Western National Bank v. Armstrong, and to note the close distinctions made by the court in the application of the rule between re-discounts and borrowing money by a bank.

While the practice of discounting bills receivable is lawful and comes within the scope and authority, impliedly and incidentally given to bank officers, and is a usage which may be recognized between banks in certain localities, and is daily practiced, it may be carried to a dangerous degree and extent. It should be guarded with a degree of conservatism and therefore the wisdom of the law is seen in making of discounts an inalienable function and power of the directors.

CHAPTER XXVIII.

DEALING IN COMMERCIAL PAPER.

§ 237. Distinction between "discount" and "purchasing."

It is the principal business of a bank to acquire commercial paper. The law does not require, and it is not held that all its promissory notes should be drawn payable and executed directly to the bank. The greatest portion of the bank's business in some localities, is in the discounting of negotiable notes. The statutes relating to national banks, expressly confer to them, the power "*of discounting and negotiating promissory notes.*"

Discounting notes is not held to be "*purchasing.*" The subject has frequently been before the courts and it is held that there is a distinction between "discounting" and "purchasing outright."

In the case of the First National Bank of Rochester v. Pierson, 24 Minn. 140, the court holds that, where it was shown by the evidence that the bank was the "purchaser" of the note in question, it was an act clearly in violation of the statute.

The court, in discussing the question, says:

"As a conclusion of law, etc., etc., the plaintiff, a national bank corporation, had no right or authority to purchase or traffic in promissory notes as "choses in actions" and did not in law acquire by the supposed purchase, any title to the notes in question, and cannot recover upon it in this action."

This is a strict construction of the statute as it does not, in expressed words, directly authorize national banks to purchase promissory notes.

It is also held in the Maryland case, Jessie Lazear v. The Union Bank of Maryland, 52 Md. 78, that a national bank is forbidden this power. The court says that there is a plain distinction between the language of the statute between "purchasing" and "discounting" commercial paper; that while the power is specifically recognized and given to a national bank to discount notes, drafts, bills of exchange, etc., the power is

conspicuously withheld authorizing national banks the power to "*purchase*" promissory notes.

The court here also construes the statute strictly upon the ground that there is no express provisions or power authorized by the law, holding that there is an important distinction between "purchasing" and "discounting" notes.

The question is of sufficient importance to give other authorities. The Supreme Court of the State of Illinois, in the case of the First National Bank of Greenville v. Asa J. Sherburne, 14 Ill. App. 566, has so clearly presented the question with such sound reasoning, holding that a National bank *may lawfully purchase a note by the way of discount.*

We cite from the opinion of the court:

"The power given to national banks as respects the matters here in issue, is 'to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt.' R. S. U. S., § 5136. It is urged the transaction involved in this case was a purchase by appellant of the note, that a national bank has no power to make such purchase, and that the bank took no title thereto and cannot recover thereon. The cases of Lazear v. National Union Bank of Maryland, 52 Md. 78; F. & M. Bank v. Baldwin, 23 Minn. 198, and the First National Bank v. Pierson, 24 Minn. 140, are cited as authorities in that behalf. As we understand the facts of the case bearing upon the question under consideration, the note was executed by appellee and payable on the first of September, 1882, to the order of one, E. B. Wise, and was by said Wise on the 29th of June, 1882, and before maturity, indorsed in blank and delivered for value through its cashier to the appellant bank. No point was made in the court below as to the title of appellant, and the evidence does not disclose what discount was made upon the note.

"The argument made here, is based upon the statement of the cashier, that he purchased the note from Wise and that it was bought in the usual course of business as he bought other notes. It may be questionable whether the words used in the statute 'by negotiating' are broad enough to include that which was here done by the bank; and yet according to the lexicographers, the word 'negotiate' means not only 'to transfer,' 'to sell,' 'to pass' but 'to procure by mutual intercourse and

agreement with another.' It appears the note was taken by a national bank and 'in the usual course of business.'

"Admitting the bank had no power to become vested with the legal title to the note otherwise than by 'discounting' it — the fair and reasonable presumption, from the fact it was taken in the usual course of business of a national bank, would be that it was discounted. The fact the cashier in stating the transaction uses the words 'purchased' and 'bought,' we do not deem of much importance.

"In Atlantic State Bank v. Savery, 82 N. Y. 291, a similar statute was under consideration and the word 'bought' was used by the witness and a written memorandum of the transfer was made and delivered at the time in which the word 'sold' was used, and yet it was held it was a discount and the title to the note was valid. In the present case, the paper was procured from Wise, who was both payee and indorser, and was transferred by an indorsement imposing the ordinary liability upon the indorser.

"Although in form and in common parlance it was a purchase of the note, yet, in substance, it was a loan by way of discount made by the bank to Wise; and the relation of debtor and creditor as between them was created.

"Discount is the difference between the price and amount of the debt, the evidence of which is transferred; and the character of the paper with reference to its being business or accommodation paper is immaterial as respects the transaction being properly denominated a loan.[1]

"Had the transfer been by delivery only, or by an indorsement without recourse, then, probably it might be regarded as an absolute purchase of the note.

"This is sufficient upon this point for the purposes of the present controversy. We are inclined, however, in the absence of Federal or binding authority as to the construction to be given this subject, 5136 R. S. U. S., to place our decision upon higher ground. A purchase may be made by way of discount equally as well as a loan may be made by way of discount. Discount means *ex vi termini*, a deduction or drawback made upon advances or loans of money upon negotiable paper or

[1] National Bank *v.* Johnson, 104 U. S. 271.

other evidences of debt, payable at a future day, which are transferred to the bank. Fleckner v. Bank of United States, 8 Wheat. 338, 350; and in the same case Mr. Justice Story speaks of 'a purchase by way of discount.' If the party dealing with the bank assumes a responsibility, it is a loan; if he does not, it is an advance made to him in consideraton of the transfer without recourse or by delivery. If a greater rate of discount is taken or reserved than the Bank Act allows, then the bank is liable to the penalties imposed by the act, but the title of the bank to the paper is not affected. The decision of the New York Court of Appeals in Govery's Case, 82 N. Y. 291, is much in point. See, also, the able discussion of the subject in the dissenting opinion in Lazear's Case, 52 Md. 126. We think the logic of the opinion of the Supreme Court of the United States in National Bank v. Johnson, 104 U. S. 271, leads to the same conclusion."

The power of a national bank to buy checks drawn by individuals on other banks has not been denied.[2]

The doctrine is settled that a draft for a sum stated drawn by a seller against a buyer in favor of a national bank, by whom it is discounted or purchased with the bill of lading attached, passes title to the goods therein mentioned to the bank.[3]

The power of a national bank to purchase notes, not being expressly conferred by statute, is, therefore, by some authorities, denied.

The question is discussed at length in the case of Merchants' National Bank of St. Paul v. Peter Hansen, 33 Minn. 40. The facts stated in the above case are given in the opinion of the court, a portion of which is here cited.

The court says:

"One, Luce, was doing business individually, under the name of 'The Bank of Breckinbridge.' He held several notes payable to himself by name, or by the name of the 'Bank of Breckinbridge.' He indorsed these notes, 'Pay G. C. Power, or order, for account, and credit Bank of Breckinbridge. (Signed) E. E. Luce.' — and sent them to the plaintiff bank

[2] First Nat. Bank of Rochester v. Horatio Harris et al., 108 Mass. 514.

[3] Union Nat. Bank v. Rowan, 23 S. C. 339.

with a letter requesting the latter to discount them, and place the proceeds to his credit. The plaintiff retained the notes, crediting the Bank of Breckinbridge with their amount, less interest to the time of maturity, and advised Luce of their action. The sum so credited was afterward paid. Before the maturity of the notes, the plaintiff sent the notes to the Bank of Breckinbridge for collection having indorsed them as follows:

"'Pay Bank of Breckinbridge, or order, for collection, account of Merchants' National Bank, St. Paul.

F. A. Seymour, Cashier.'

"Luce, receiving the notes, transferred them by indorsement before their maturity, with the indorsements uncancelled upon them, to the defendant in payment of a precedent debt. The defendant noticed the indorsements when he received the notes, but asked no questions, and appears to have had no notice of the plaintiff's rights respecting the notes, except as it is to be inferred from what has been stated. The defendant having refused to restore the notes to the plaintiff, this action is prosecuted to recover their value.

"In First National Bank of Rochester v. Pierson, 24 Minn. 140, this court decided that national banks were not authorized to purchase promissory notes, in the ordinary sense of the word 'purchase,' the transaction not being a discounting of the paper or a lending of money upon the credit of it; and the defense of *ultra vires* was sustained in an action upon a note so purchased. Since that decision was rendered, the act of Congress upon which it was based has come before the Supreme Court of the United States for construction.[4]

The decisions of that court are to the effect that the enforcement in favor of a bank of securities upon real property, which securities the bank had acquired without authority, could not be opposed by the plea of *ultra vires*, but that it was intended by Congress that the consequences of such violations of law should be only such as might be imposed in proceedings instituted against the bank by the government. This construction of the law of Congress is authoritative, and it is our duty to follow it. In doing so, we necessarily overrule Bank v. Pier-

[4] National Bank *v.* Matthews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99.

son, *supra*, as to the effect of the plea of *ultra vires* in such cases.

"Applying the principle established by these decisions to the case before us, it is not material whether the transaction through which the plaintiff acquired the notes was a purchase of the notes in the ordinary sense of the word 'purchase,' or a discount of the notes as a loan to the payee. In either case the plaintiff's right as against this defendant would be the same. That the plaintiff acquired the notes either as its absolute property or as security is conclusively shown by the evidence. The defendant claims that the case shows a simple purchase of the notes by the plaintiff. This may be conceded for the purpose of the case. The special verdict of the jury, to the effect that the plaintiff discounted the notes for the benefit of the Bank of Breckinbridge, is not inconsistent with their general verdict in favor of the plaintiff, and may be disregarded without affecting the result. The plaintiff was entitled to recover, unless the defendant is to be deemed as having taken the notes unaffected with notice of the plaintiff's rights. The court declared the indorsements sufficient to charge the defendant with notice of whatever interest the Merchants' National Bank had in the notes, and refused to submit the question of the defendant's *bona fides* to the jury. Whether this was error is the only remaining question to be considered."

The power of national banks to purchase notes, not being expressly conferred by statute, the incidental right is denied. The question has not been fully settled by the Supreme Court of the United States; but the doctrine that a national bank may "purchase a promissory note by the way of discount," has been held lawful by the Illinois Appellate Court.

There does not seem to be any good legal reason why a national bank should be excluded from purchasing outright, promissory notes. While the statute does not, in words, authorize it, it does not directly or expressly deny the power. The arguments presented by the various courts, holding that it is a violation of the statute and that banks have no power incidentally, place their conclusion upon the proposition, that, if not specially authorized, the privilege is denied.

The principal business of a bank is in the loaning of its money by taking promissory notes. If the interest laws of the State

have not been violated by the terms of the note and the note is negotiable, it is difficult to see upon what reasoning the courts hold that the bank has no incidental power. While the bank's authority is controlled by the statutes, which are the expressed provisions of the law regulating its acts, by the very nature of its business it has full power to carry into execution every lawful transaction coming under its privileges and incident to banking, though the privilege is not specifically expressed in the statutes.

The bank loaning money directly to "A." upon his promissory note is lawful.

The bank buying a note from "A." executed to him by "B." is claimed to be unlawful. Upon just what principle of reasoning it is not clearly understood; both are only a mode of loaning money. The statute authorizes a bank to accept checks assigned to it by the payee when drawn on another bank, and it may lawfully do so, though the checks be post-dated. This is purchasing from "B," a check drawn by "A." The transaction may be termed a discount, but if the bank has paid out the money on the check to "B," it could as well be called a purchase of the check.

§ 238. State banks, power not limited.

The power of State banks to purchase promissory notes when drawn negotiable, has never been questioned. The statutes of all the States make promissory notes, when drawn negotiable, a class of instruments that may be purchased and transferred from one person to another, and the purchaser may legally hold and enforce payment thereon.

The power to buy and sell promissory notes therefore is an incidental power granted to State banks.

To deny this authority to a banking corporation, whether such corporation be organized under the National or general laws of a State, may raise the constitutional question — "can the Legislature by a general law, which declares a note negotiable then enact a law and say that it is an instrument negotiable, but one which a banking corporation shall not purchase?"

Savings banks, by special statutory provisions, may be estopped by a statute, from making loans upon personal secu-

rity; but the purchasing of a note secured by mortgage on real estate is not prohibited, and where the statute only required that a certain percentage of the loans of a savings bank must be made upon real estate security, the bank may invest the remainder of its loanable funds in promissory notes, and the mode of investment, whether by loaning outright or purchasing a note by the way of discount, cannot be questioned.

The charter of a State bank may limit the power in the organization and say that it shall not purchase promissory notes; but must invest its money in promissory notes made directly to the banking corporation; but in the absence of such provisions, in the bank's charter, a State bank has the power to purchase outright a negotiable promissory note.

CHAPTER XXIX.

BANKS HOLDING PUBLIC FUNDS.

§ 239. National banks depositaries — Public moneys.

Section 5153 Revised Statutes U. S. provides that:

"All National banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money shall take and receive at par, all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue or for loans or stocks."

By the provisions of this section, national banking associations which are designated for that purpose by the Secretary of the Treasury, shall be depositaries of public moneys.

Public money is defined by Black as follows:

"This term, as used by the laws of the United States, includes all the funds of the general Government derived from the public revenues or intrusted to the fiscal officers."

When a national banking association desires to be designated as a depositary of public money, application for that purpose must be made directly to the Secretary of the Treasury. Upon receipt of such application, the Secretary of the Treasury has discretionary power to refuse or grant the application. If the application is granted, the security required will be furnished by the depositary bank. The security re-

quired to be furnished as to amount is discretionary with the Secretary of the Treasury; but in no instance will a designation be made on security less than $50,000.

Where a national bank, not designated as a depositary of public money, under the permissive authority of law receives deposits made by postmasters in their official capacity, the money so deposited assumes a fiduciary relation to the Government and the bank thereby becomes the bailee, and as such bailee, it becomes directly responsible to the Government for moneys which it knowingly or negligently allows the postmaster to withdraw by private check.[1]

Sections 3620, 4046, 3847, 4046, 5488 and 5497 Revised Statutes, U. S., treat upon the duty concerning disbursing officers and upon postmasters depositing with depositaries, and postmaster's deposits where made within a county where there are no designated depositaries, and also penalty where unauthorized deposits of money and penalty for unauthorized receipts or use of public money.

A national bank designated as a depositary of public money does not constitute the bank an agent of the Government, and the Government, in case of failure of the bank, will not be liable for the deposit.[2]

A national bank does not have to be designated as a depositary of public money to give it authority to receive public moneys or funds belonging to States, counties, cities and like municipalities. In the case of State of Nebraska v. First National Bank of Orleans, 88 Fed. Rep. 947, held: "Where a State Treasurer places State funds in a national bank subject to check, the bank giving security therefor and agreeing to pay interest on daily balances, the transaction is a deposit and not a loan to the bank."

State banks, unless prohibited by statute, may accept public moneys on deposit. But where the statute of a State forbids the taking and holding of such funds, they can only (if at all), be accepted as a special deposit, which is a deposit made of a particular thing, with a depositary; and when made of money which is sealed up, the title to it remains in the depositor. A deposit of public funds, when made a special deposit in a bank,

1 United States *v.* National Bank of Ashville, 73 Fed. Rep. 379.

2 Branch *v.* The U. S., 1 N. B. C. 363.

the relationship of debtor and creditor as between the depositor and the bank is not established, and the funds when so deposited cannot be carried or intermingled with other funds of the bank. They must be kept separate and apart from the general deposits, and be turned over to the public officer or authority authorized to receive them at any time when demanded.

A State bank prohibited by statute from accepting public money on deposit in a general way, is not permitted to pay interest on a special deposit.

Public funds cannot be loaned by the bank when accepted as a special deposit; but when a bank has the right by law to accept public funds on deposit in a general way, it may agree to pay interest on the same and may loan the deposits.

It has been held that, as between the treasury of a school district, handling school funds, where a depositor deposited such funds in the bank by a general deposit, which ordinarily creates the relationship of debtor and creditor, the banker receiving such funds, knowing them to be held by the depositor in an official capacity, if the bank accepts the same, it becomes a trustee for the beneficial owner, the school district.

Where the Constitution of a State by its provisions forbids the depositing of public moneys in a bank, to be held by it as a general deposit, the taking of such deposit is a direct violation of law; and where the statute provides that it is a felony the officers of such bank become criminally liable.

CHAPTER XXX.

BANKS DEALING IN REAL ESTATE.

§ 240. Limitations upon national banks.

The National Banking Act, section 5137, Revised Statutes of the United States, provide:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"*1st.* Such as shall be necessary for its immediate accommodation in the transaction of its business.

"*2nd.* Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"*3rd.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"*4th.* Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

A national banking association cannot purchase or convey real estate by conveyance executed by its officers, unless such conveyance be duly authorized by a resolution passed by the board of directors.

A national bank may purchase and hold real estate, first, such as shall be necessary for its immediate accommodation in the transaction of its business.

There are no restrictions or limitations imposed as to the amount that may be invested in real estate or in a banking house to be used by the bank in the conduct of its business. The amount that it may invest is a discretionary measure to be determined only by the board of directors.

Where a banking association invests a large portion of its capital stock in real estate, and a banking house is erected

thereon, which investment is far in excess of the requirements necessary for its immediate accommodation in the transaction of its business, such an act would certainly be bad policy, if not a violation of the statute.

The bank may claim that the investment is a profitable one, but the statute restricts it and limits its power to the purchase of such real estate as shall be necessary for its immediate accommodation in the transaction of its business.

The Supreme Court of the United States, in the case of McCormick v. Market Bank, 165 U. S. 538, denies the power of a bank to contract by lease (at a large rent of) an office to be occupied "as a banking office and for no other purpose," for a term of years, before having been duly authorized by the Comptroller of the Currency, the privilege of commencing business.[1]

A national bank may "hold" such (real estate) "as shall be mortgaged to it in good faith by way of security for debts previously contracted."

The bank is expressly prohibited from taking a mortgage to secure a debt unless the debt is one which has been previously contracted.

A debt previously contracted is one made at a date prior to the date of the mortgage. The debt may be one antedating the mortgage a month or a day. If the mortgage is taken on the same day the debt is contracted, it would be tainted with suspicion, from which evidence could only relieve it.

In the case of First National Bank of Fort Dodge v. Haire *et al.*, 36 Iowa, 443, where a national bank refused to negotiate a loan upon the responsibility of a firm, but agreed to and did make the loan upon a note made by one member of the firm to the other and indorsed by the latter to the bank, the maker giving a bond and mortgage upon separate property to secure the indorser against liability upon his indorsement, with an agreement that, in case of default, the security should inure to the bank, held: That the bond and mortgage were not within the prohibition of the act of Congress creating national banks against such banks holding real estate by purchase or mortgage; that the same were, therefore, legal and binding

[1] McCormick *v.* The Market Nat. Bank of Chicago, 162 Ill. 100.

and might be enforced for the benefit of the bank. The court in construing this statute, says:

"We would not construe this, or any other statute, strictly and by its very letter only; but would look to its object and purpose, and give to its language such just and fair interpretation as would most completely effectuate that purpose. Not forgetting this, let us look first at its terms.

"It does not prohibit the mortgage of real property to another to be by that other held as security for a contemporaneous loan made by the bank; it says in effect that the bank may hold such real estate as shall be *mortgaged to it* in good faith for debts previously contracted, and that *such association* (bank) shall not hold real estate for any other purpose than as specified. Now, it will be noticed that the real estate in controversy was not mortgaged *to* the plaintiff and that the plaintiff does not now hold it. Hence, this case is not within the letter of the statute.

"But it is claimed that the effect of the transaction, as claimed by plaintiff and as proved, is the same as a mortgage to it, and therefore, it is within the spirit or purpose of the law. When prudent officers of a bank are asked to make a loan, they look *inter alia* to the ability of the borrower to pay as evidenced by his property, real and personal. If he has not sufficient property, they decline the loan; but if some friend of his shall convey to him in fee sufficient real estate, the same officers might make the loan. The loan, so made, would not be within the act, although the officers, in good faith, relied upon such real estate by way of security for the repayment of the loan. And, if an indorser was offered who was thought insufficient, but when certain real estate was conveyed to him he was regarded as sufficient, the rule would be the same. And, if instead of being conveyed absolutely, it was simply mortgaged to the indorser, and thereby he was thought to be sufficient security, the rule would not be different. In either case the reliance would be upon the real estate and the ability to pay by reason of it. Neither would be within the prohibition of the act of Congress. Nor would it alter the case, if the borrower or indorser should say to the officers, if I fail to pay at maturity, there is the real estate and you may subject it to the payment of the debt. This they

could do without such declaration. In other words, every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors, and unless the title by mortgage or conveyance is taken by the bank or directly for its use, the case is not within the prohibition of the statute.

"The fact that the title or security may inure indirectly to the security and benefit of the bank, will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this."

Where "A" executes a promissory note to "B" secured by a trust deed on real estate, a national bank may loan money to "B" on his personal note, and take an assignment of the trust deed as security therefor; and may foreclose the security.[2]

A national bank cannot take a mortgage upon real estate to secure notes thereafter to be discounted.[3]

In the case of Shinkle *et ux* v. First National Bank of Ripley, 22 Ohio St. 516, held: That where two or more parties were jointly indebted to one bank in two several sums of money, and also to another bank in one sum of money; and a mutual agreement was entered into whereby the notes of the bank should be surrendered, and the several debtors give their individual notes and mortgages for their portion of the indebtedness; all of said notes by agreement being drawn to a third person, and by him indorsed to one of the banks; that in an action by the bank against one of the debtors upon the note and mortgage, there was a sufficient consideration to support the new notes and mortgages; and that the bank had authority to foreclose. That it had the power to adopt reasonable and such necessary measures in collecting the debt; that such a power was an incidental power belonging to the bank and not in violation of the statute.[4]

A national bank is empowered to hold real estate such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its business. And where a national bank loaned a large sum of money to "B" to engage in the lumber business, "B" afterward becoming embarrassed, the

[2] Bank *v.* Matthews, 98 U. S. 621.

[3] 72 Pa. St. 456; Fridley *v.* Bowen, 87 Ill. 151.

[4] Heath et al. *v.* The Second Nat. Bank of Lafayette, 70 Ind. 106.

bank secured a deed of trust upon the timber lands owned by "B" to secure its debt. Afterward the bank foreclosed upon said lands, purchased the property which was not redeemed, and through the bank's agent it conducted the lumber business. This being done wholly with a view of reimbursing itself out of the proceeds of the business for the money it had loaned. The court held that there is in connection with all corporations, certain implied powers which are incidental to the expressed powers, and without which no corporation can successfully transact business, and that the corporation lawfully exercised the right to conduct a lumber business and save its debt.[5]

The above case does not directly or indirectly, by implication or otherwise, sanction the right of the bank to conduct a lumber business, run saw-mills and the like; but coming into possession of lands upon which timber or crops are growing and by the marketing and selling the same, the debt to the bank can be canceled and paid, the act becomes an incidental power and one not in violation of the principles of law, which provides that a banking corporation shall not be permitted to conduct any other business than that for which it was incorporated to do.

It is a well settled principle that a national bank has no power to buy land for the purpose of selling it again for profit; but it may take land in payment of its claim, and "an agreement by a bank to procure a release of a mortgage held by a third party upon lands on which the bank had a mortgage, is not primarily an agreement relating to banking. But when made to secure payment of the debt due to the bank, the agreement is not *ultra vires*."[6]

"A national bank may purchase real estate to secure satisfaction of a debt due it, even though it costs a considerable sum over and above the debt, and the title to the land is acquired from another than the debtor, and may take the title thereto in the name of its president for its use."[7]

A national banking association has authority to purchase

5 John A. Roeblings, Sons Co. *v.* First Nat. Bank of Richmond, Va., 30 Fed. Rep. 744.

6 Thomas McCrant, Respondent, *v.* National Mohawk Valley Bank, 104 N. Y. 414.

7 Washington Libbey et al. *v.* Union Nat. Bank et al., 622.

such real estate as may be necessary in order to secure a debt due to it although in excess thereof, *if the security of the debt is the real object of the purchaser.*[8]

It is well settled that when a national bank legally acquires real estate, it may sell it again and take a mortgage back to secure deferred payments.[9]

It seems to be settled that if a national bank should take from a debtor, real estate which it clearly had no right to hold, the title would be defeasible only at the instance of the State.

The Court, in the case of Mapes v. Scott, et al, 94 Ill. 379, says that:

"Conveyances to a national bank must for all purposes be regarded as valid until called into question by a direct proceeding instituted for that purpose by the Government, as held in National Bank v. Matthews, 8 Otto 621. As this decision of the Supreme Court of the United States involves a construction of an act of Congress, it is paramount and must prevail."

The government alone can complain that the bank has exceeded its powers.[10]

The last provision of section 5137 relating to banks holding real estate, provides that such associations shall not hold the title to real estate for a longer period than five years.

For a violation of this provision of the law, the government alone can complain. There being no provision of law fixing a penalty or forfeiture of lands held for a longer period, the bank may, unless complained against, sell the same after the period of five years and the purchaser would take a good title.

§ 241. State banks dealing in real estate.

A State bank has no authority to buy and sell real estate or deal in the same for profit.

A corporation organized under a State law to conduct a banking business, cannot buy and sell real estate for speculative purposes. It is limited in its purposes to conduct such business as comes within its scope and powers expressed and implied in its charter and the law.

8 Upton *v.* National Bank of So. Reading, 120 Mass. 153.

9 First Nat. Bank *v.* Kidd, 20 Minn. 234.

10 National Bank *v.* Matthews, 98 Otto (U. S.) 621; Reynolds *v.* Crawfordsville Bank, 112 U. S. 405.

The buying and selling of real estate for profit is purely speculative and is unlawful.

Where the law of the State limits the amount that may be invested in banking premises, it is mandatory and if violated is cause for declaring a forfeiture of its charter. But when there is no restriction upon this subject, it is a question of privilege left entirely in the hands of the board of directors. They may then invest in real estate and improve the same to such an extent as may be necessary for the use of the bank in conducting its business.

To invest a large portion of the capital of a bank in real estate, and improve the same under the plea that it is to be used for banking purposes, when a reasonable investment would meet the immediate necessities of the bank, is a breach of the bank's power.

When this power is grossly abused and the capital stock of the bank is in such a manner consumed to the injury of the stockholders, the directors make themselves personally liable. Their acts become gross extravagance or gross negligence of their powers and duties. As an illustration of reckless extravagance and improvident investment of the bank's funds in real estate, the facts in the case of Hun v. Carey, 82 N. Y. 65, are given.

Where a savings bank which was incorporated in 1867, up to January, 1873, its average deposits were about $70,000, and its expenses had exceeded its income. It appears in May of that year, by action of the board of trustees, the bank purchased a lot at a cost of $29,250. Ten thousand dollars of the purchase-money being paid in cash; the bank covenanting to erect a building thereon to cost not less than $25,000. Upon the lot the bank erected a building for a banking-house at a cost of about $27,000, and gave a mortgage thereon of $30,500. The object of the purchase and buildings was to improve the financial condition of the bank by increasing its deposit. The bank failed in 1875. The lot and buildings and other property, which produced less than $1,000, constituted all of its assets; the real estate was swept away by foreclosure of the mortgage. At the time of the purchase the bank occupied leased rooms; its assets were insufficient by several thousand dollars to pay its debts, which fact was known to the trustees. By

the charter of the bank, it had power to purchase a lot for a banking-house, requisite for the transaction of its business. In an action brought by the receiver of the bank against the trustees for damages caused by alleged improper investment of its funds, held by the court, that the facts justified a finding that the case was not one of mere error or mistake of judgment on the part of the trustees, but an improvident and reckless extravagance, and that they were properly held liable.[11]

A State bank has power to take real estate under foreclosure proceedings. To buy the same to secure a debt simultaneously or previously contracted. To buy at a price over and above the amount necessary to satisfy its claim. To pay off a prior lien in order to secure or save its debt. It also has the right, while holding such lands, to conduct the business of farming the same, and improve the land, if necessary, by building a residence thereon, building fences, dig a well, cutting timber from the land, operate a sawmill and sell the products; and do anything necessary to be done in relation thereto in the interest of the stockholders and the depositors. It has the power to do whatever is necessary to render productive, property that it has taken for debt.

In the further discussion of this subject, the Supreme Court of Georgia, in the case of Reynolds, assignee, v. Simpson and Ledbetter, 74 Ga. 454, the court says:

"Where a banking corporation acquired possession of property, either by a lien thereon, or the purchase of the same, for the payment of the debt due to it, and expends money on it, or furnishes supplies either for its preservation or to carry on the business in which such property is employed, with a view of rendering it productive, in order to satisfy the debt it holds against the former owner of the property, it is not chargeable with exceeding its corporate powers by engaging in a business beyond the scope and purpose of its creation. It is merely exercising a power which is common to all corporations; it can purchase and hold such property, real or personal, as is necessary to the purposes of its organization, and can perform all such acts as are necessary for the legitimate execution of such purposes."

11 Hun *v.* Cary et al., 82 N. Y. 65.

The Constitution of the State of California, article XII, § 9, provides that a corporation "shall not hold for a longer period than five years any real estate except such as may be necessary for carrying on its business."

A banking corporation (under circumstances which it cannot prevent) may be compelled to purchase real estate at a judicial sale in order to save an advancement made by it as a loan upon the same, and it cannot by law be compelled to dispose of said real estate within a limited time; especially so when, if forced to sell the same, the sacrifice would destroy the solvency of the bank, and cause serious loss to depositors and creditors.

It might be a reasonable construction of this provision of the constitution to say that the lands purchased at a judicial sale by the bank, wherein it was the plaintiff in the foreclosure proceedings, and was endeavoring to collect a debt, that the bank, if it became the purchaser at the sale and afterward obtained the title to the property, could hold the same *as a necessary asset for carrying out its business,* and would not be compelled to sacrifice the same at sale within the five years.

CHAPTER XXXI.

OFFICERS BORROWING FUNDS OF BANK.

§ 242. Prohibited from loaning to themselves.

All banking associations, unless restricted by law, may make loans to their officers and agents; but the incidental powers vested in an officer of a bank, permitting him to loan the funds of the bank to others, does not authorize such officer or agent of the association over which he presides and represents to make a loan of the bank funds to himself. His relationship as an agent of the bank may invest him with incidental power to make loans to others; but his office prohibits him from loaning to himself the funds of the bank. He cannot certify his own check or sign a certificate of deposit made payable to himself.

The power to loan the funds of the bank and make discounts is vested by law in the board of directors.

Where an officer of the bank executes a note drawn payable to the bank over which he presides, and takes the money represented by the note without first securing authority from the board of directors, his act becomes unlawful and may be treated as a felony.

While acting in an official position and representing the bank, his duties are to preserve its funds and protect it in all of its transactions. He is employed for this purpose, and to execute the orders of the board of directors. To perform all the executive acts necessary to carry on the business of the bank; but he has no power or authority to borrow any of the funds of the bank unless permitted to do so by the board of directors.

The fact that he may have secured his note by ample collateral security does not authorize or legalize the act; but where the board of directors or the financial committee appointed by the board have authorized and approved of a loan to be made to an officer of the bank, he may execute his note to the association and borrow its funds.

§ 243. Restrictions and limitations.

Where the law imposes restrictions as to the amount which may be loaned to any one person, association, or company, the

directors who *willfully* violate the law by authorizing a loan in excess of the amount specified in the law, and where by such action a loss occurs to the bank, they make themselves civilly and criminally liable.

The National Banking Act, section 5200 Rev. Stat. U. S., provides that:

"The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed."

In discussing the object of this provision, Chief Justice Ruger of the Court of Appeals of New York, in the case of Second National Bank v. Burt, 93 N. Y. 233, says:

"The object of this provision of the Currency Act was to guard national banks from the hazard of loaning money in improvident amounts upon speculative and accommodation paper, but it contemplated and permitted to an unlimited amount the discount of paper used and required in facilitating the transfer of property and money in the transaction of the legitimate business of the country."

The provisions of this section limit the amount that may be borrowed from the association by any one person, company, corporation, or firm. It is not a restriction prohibiting an officer or director of the bank from borrowing its funds, but limits the amount that may be borrowed. Where a loan is made to an officer or other person in violation of the statute it is not void, but can be collected.

In the State of California, the Legislature has enacted the following law:

"No director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, nor must he become an indorser or surety for loans to others, nor in any manner be an obligor for moneys

borrowed of or loaned by such corporation. The office of any director or officer who acts in contravention of the provisions of this section immediately thereupon becomes vacant."

The Supreme Court of the State of California, in the case of Brittan v. Oakland Bank of Savings, 124 Cal. 282, in discussing this subject and construing the provisions of said section, says that:

"At the time of the transaction between Bowman and the bank, as already stated, he was a director in the bank. The Civil Code, section 578, declared that no director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, and declares that the office of any director or officer who acts in contravention of this provision shall immediately thereupon become vacant. This, however, is of no advantage to the appellant, as the violation of the provision in question could only be availed of at the instance of the State sovereign power.[1]

"Besides, the transaction was executed. In Savings Bank v. Burns, 104 Cal. 473, the court, in answering a similar contention that the transaction was void as being in contravention of the provision of the Code, says:

"'We do not think this contention can be sustained. The obvious purpose of the section of the Code invoked and relied upon was to protect savings banks and their depositors. To hold, therefore, that if the deposits or funds of such a bank should be borrowed by any of its officers, directly or indirectly, no action could be maintained by the bank to recover the money, would often work out great injustice and wrong.'

"The bank, therefore, could have sued Bowman to recover back the money loaned, and it can hold the pledged stock or its proceeds in a suit for the recovery of the same until such money lent on the faith of such pledge is repaid."

There is no penalty fixed by the statute laws of the State of California, for a violation of section 578 of the Civil Code, other than that the office of any director or officer who acts in contravention of the provisions of said section shall immediately thereupon become vacant.

1 Jones v. Guaranty, etc., Co., 101 U. S. 628; National Bank v. Matthews, 98 U. S. 621.

The protection given to the bank and the depositors by the provisions of this section is valueless. It is no punishment to vacate an office after the funds of the bank have been taken.

Where the Legislature has not by the enactment of a law prohibited an officer of a State bank from borrowing money therefrom, or limited the amount which any one person may borrow, such loans are, if made in good faith and authorized by the board of directors, lawful. But a loan made by an officer of a bank to himself of the funds of the bank over which he presides, without first having such loans approved by the board of directors, is as previously stated, unlawful.

The law regulating the power of officers presiding over savings banks generally prohibtits such officers or directors from borrowing or becoming in any manner indebted to the association over which they preside. This inhibition is upon the principle that they are acting in the capacity as trustees. That the funds are trust funds, and are such as should be sacredly guarded by them, and when loaned or invested they must be to such persons who have no responsibility as officers or directors.

Loans to officers and directors in all banking corporations over which they preside should be authorized and limited by legislation. That the Legislature is invested with power to impose such limitations, there can be no question. If the State has the power to regulate the business of banking, it is clothed with authority to protect and direct its management at least upon the lines of prudence and safety.

CHAPTER XXXII.

EMPLOYING COUNSEL.

§ 244. Authority in president or cashier.

Subdivision 4 of section 5136, Revised Statutes of the United States, provides that a national bank is endowed with the power "to sue and be sued, complain and defend in any court of law and (or) equity as fully as natural persons."

A national bank under this provision of the law has full power to employ an attorney to bring or defend suits in any court of law or equity.

The by-laws of the bank may provide that the board of directors shall have the exclusive power to engage or employ counsel for the bank, or the authority may be delegated to the president. If the by-laws are silent and no provision is made delegating the authority to engage or employ counsel, the president of a bank, as its executive officer, has the authority conferred upon him without waiting for or first obtaining such authority from the board of directors.

The agreement for compensation to be paid the counsel so employed may be made by the president, and the bank will be bound thereby.

In the case of The Citizens' National Bank of Kingman v. George F. Berry & Co., 53 Kan. 696, the court holds that the president of a banking corporation has the power to employ counsel and manage the litigation of the bank in the absence of any order of the board of directors depriving him of such power.

In the absence of the president of the bank, the cashier has the power to employ counsel and may perform this function at any time if the necessity is an emergency, without first obtaining authority from the board of directors.

Where the district attorney conducts a suit against a national bank and obtains a forfeiture of its charter, it is held that he is not entitled to more than $10, the amount prescribed by section 824, Revised Statutes of the United States, there

being no other law authorizing or giving compensation to a district attorney for such service.[1]

A district attorney cannot recover compensation for services rendered for conducting suits arising out of the provisions of the National Banking Law, in which the United States or any of its agents or officers are parties.[2]

1 Bashaw *v.* United States, 47 Fed. Rep. 40.

2 Gibson *v.* Peters, Receiver, 150 U. S. 342.

CHAPTER XXXIII.

DONATIONS BY BANKS.

§ 245. Power vested in stockholders.

A bank cannot, through its officers or directors, donate any portion of its funds, surplus, profit, or capital, for any purpose whatever. Objects of usefulness or charity, however worthy of encouragement or aid, cannot in any way be supported by gifts or donations from a banking corporation.

This restriction seems to be a very hard one, but it is not within the power of the officers or directors of the association to give away any of its funds or earnings.

The stockholders, if the consent of all are obtained, may make donations, but the president, cashier, or directors are prohibited.

A subscription in support of a church, or circulating the Bible either at home or in foreign lands, if made without the consent of all the stockholders, is unlawful.

Where the president of a bank who subscribed a fund to certain parties, on condition that they would erect a paper mill in a certain city, held, first, that the making of donations of its funds to aid in the building of a paper mill, was no part of the business for which the bank was incorporated; second, that the act of the president was not within the scope of his authority and that the bank, in the absence of an authorization or ratification by it of the president's act, was not bound by the agreement made.

The funds of a corporation belong to its shareholders, and an agent of the corporation has no implied authority to give away the corporate property. In Jones v. Morrison, 31 Minn. 140, it is said:

"The directors of the corporation have no authority to appropriate its funds in paying claims which the corporation is under no legal or moral obligation to pay; as to pay for past services which have been rendered and paid for at a fixed salary, previously agreed on; are under a previous agreement, that there should be no compensation for them."

To the same effect, see Salem Bank v. Gloucester Bank, 17 Mass. 1; Bissel v. City of Kankakee, 64 Ill. 249; Miner v. Mechanics' Bank, 1 Pet. (U. S.) 44. See Case v. Bank, 100 U. S. 446, where the court, in discussing this question, correctly says:

"If this bank can be bound by the agreement of its president to donate $200 to an individual, to aid him in building a paper mill, then the bank can be bound by the agreement of its president to donate its entire capital. Such a rule as this would confer upon the agent of a corporation greater powers than that possessed by its directory."

CHAPTER XXXIV.

CONDUCTING SAFE DEPOSIT.

§ 246. Incidental power.

Where the charter of a bank does not provide for the conducting of a safe deposit department, the business if entered into is an incidental power and one entirely discretionary with the board of directors. The business of conducting a safe deposit and building safe-deposit vaults, for the purpose of preserving property or money, is a discretionary power vested in the directors of the bank.

When a banking corporation conducts such a business in connection with the general business of banking, and receives personal property, including money, from individuals for safe-keeping, the general rule of law is, that the bank becomes a bailee, and in case of loss is liable as such.

It should be borne in mind that there is a distinction between the business of conducting a safe deposit and the taking of money or personal property on special deposit.

Where the bank conducts a safe deposit business for the benefit of its customers without compensation, it is liable only for gross negligence; but persons depositing valuable articles in banks for safe-keeping without reward have the right to expect that such measures will be taken as will ordinarily secure them from burglars outside and from thieves within.

Where persons are engaged in the business of banking, and receive for safe-keeping a parcel containing bonds, which was put in their vaults, and they were notified that their assistant cashier who had free access to the vaults where the bonds were deposited and who was a person of scant means and engaged in speculation in stocks, and the directors made no examination as to the securities deposited with them, the assistant cashier having stolen the bonds so deposited; held, that the directors were guilty of gross negligence and were liable to the owner of the bonds for their value at the time they were stolen.[1]

1 Preston *v.* Prather, 137 U. S. 604; Gray et al. *v.* Merriam, 148 Ill. 179.

In the case of Chaflin *et al.* v. Meyer, 75 N. Y. 260, the court lays down the rule of negligence to be as follows:

"The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery, or, to use the language of Sutherland, J., in Schmidt v. Blood, where 'there is a total default in delivering or accounting for the goods' (9 Wend. 268), this is to be treated as *prima facie* evidence of negligence.[2]

"This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

"But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume, in the absence of proof on the point, that such fire or theft was the result of his negligence.[3]

"Grover, J., in 46 N. Y., says, in delivering the opinion of the court, the question is 'whether the defendant was bound to go further (i. e., than showing the loss by fire) and show that it and its employees were free from negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs to maintain the action to prove that the fire causing the loss resulted from such negligence.' And he proceeds to show that the charge of the judge who tried the cause gave to the jury the former instruction, and that this was contrary to the law and erroneous. So Sutherland, J., in 9 Wend. (*supra*), in the case of a warehouseman, says the *onus* of showing the negligence 'seems to be upon the plaintiff, unless there is a total default in delivery or accounting for the goods.'

2 Fairfax *v.* N. Y. C. & H. R. R. R. Co., 67 N. Y. 11; Steers *v.* Liverpool Steamship Co., 57 N. Y. 1; Burnell *v.* N. Y. C. R. R. Co., 45 N. Y. 184.

3 Lamb *v.* Camden & Amboy R. R. Co., 46 N. Y. 271; Schmidt *v.* Blood, 9 Wend. 268; Platt *v.* Hibbard, 7 Cow. 497.

"And he cites a note of Judge Cowen to his report of Platt v. Hibbard (7 Cow. 500), in which that very learned author says, criticising and questioning a charge of the circuit judge, 'the distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie (Anonymous, 2 Salk. 655), but when he has shown a loss, or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff.'

"It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real 'shifting' of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in *all cases,* suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman."

National banks have no direct legislative authority under the National Banking Act, or by any special provision of the statute, to invest any portion of their capital in the construction of a safe-deposit vault, and equip it with boxes for the conduct of such business; but it is claimed that the Comptroller of the Currency holds that this power or privilege is one largely within the discretion of the board of directors.

Where a State bank organized under a State law does not avail itself by a provision in its charter with the power to conduct, in connection with its business of banking, a safe-deposit

business, it becomes a privilege purely incidental to that of banking, and where the officers of such a banking corporation, without authority vested in the charter of the bank, conducts such a business and establishes a safe-deposit vault and receives property for deposit without the authority or knowledge and consent of the directors, their acts are not within the scope of their authority as agents, and are not binding upon the corporation.

CHAPTER XXXV.

BANKING HOURS.

§ 247. When binding upon the public.

A banking corporation can prescribe by its by-laws reasonable hours of business during which its business with the public shall be conducted.

A by-law enacted to the effect, if the hours prescribed are reasonable, is binding upon the general public.

In the case of Marshall and Others v. The American Express Company (appeal from the Milwaukee Circuit Court), 73 Am. Dec. 381, the court says:

"This term (banking hours) has acquired a meaning among bankers and merchants, but it is by no means uniform. What are banking hours in some places are not in others. In the city of New York banking hours are understood to be from ten o'clock a. m. to three o'clock p. m. In the city of Milwaukee, from 9 a. m. till twelve and a half p. m., and from two till four p. m.

"All we know from the evidence in this case, in regard to banking hours in Madison, is from Mr. Hill, who says 'banks at Madison close at four o'clock.' But, however, the term may vary as to time; what is understood by 'banking hours,' in a technical sense, is the particular hours of the day within which the banks of a city or town transact the usual banking business with the public over the counter, such as discounting bills, receiving deposits, and paying checks, etc. It is reasonable and proper that there should be a uniform hour at which this kind of business should cease, in order to give the officers and agents of the bank an opportunity to write up the books and adjust its balances for the day.

When these banking hours are uniform and reasonable, the law will regard them in respect to the purposes for which they are established. But these hours only have reference to the intercourse of the bank with the public at large, in relation to the exclusive business of banking. Business quite as important is always transacted after these hours have elapsed — balances

with other banks to be ascertained, cash account brought up, and cash counted; and many other things which will suggest themselves to the banker, which are always done after 'banking hours,' even the very business of making up and transmitting packages, as well as receiving them; not only because it can be done more conveniently after the business with the public is closed, but because until such business is closed much of it could not be done.

"The convenience or inconvenience of the bank, whether serious or not, had nothing to do with the duties of the defendants as carriers."

The court also says, in the further discussion of this question, that:

"It does not follow that the vaults of the bank are necessarily closed because the hour for doing business over the counter has transpired. Nor are persons who have a right to transmit messages or packages to the bank answerable if they chance to be closed. Therefore, if it had been the habit of the bank to receive packages from the party and of the kind in question on the arrival of the train after the hour of four o'clock p. m. * * *

"The State Bank at Madison had no more right to declare or insist that it would receive no packages after what it pleases to call 'banking hours,' than has any merchant, warehouseman or wharfinger a right to decline the reception of a valuable package of goods after a certain hour; and in that manner thrust upon the carrier the further continuance of his extraordinary responsibility. It would doubtless be very convenient to consignees if they were permitted to prescribe rules of delivery from time to time as their own convenience should suggest. But such is not the law. It is true that it is competent for banking houses, private as well as corporate, to establish rules of business and to prescribe the time within which its peculiar business with the public shall be done. But this power is not an absolute or arbitrary one. * * *

"While it is proper and necessary for the general convenience of all parties that certain hours shall be named within which the bank will receive deposits, pay bills and drafts, discount notes, etc., it is neither reasonable nor proper that the

same hour shall be designated for the transaction of its other business."

The term "banking hours" has reference to the time in which the ordinary business of a bank is to be done. It is competent for a banking corporation to prescribe certain banking hours within which their peculiar business shall be done, but these hours must be reasonable and adapted to their peculiar business with the public in general.

"Banking hours" are recognized by the courts to the extent that any ordinary transactions occurring in the business of banking must be performed within "banking hours" upon that day.

While a bank may make a rule that it will not receive deposits after three o'clock, it is held that where a carrier delivers a box of specie to the bank after the hour named for closing, it cannot refuse to accept the same.

Where the doors of the bank are closed to all kinds of business after certain reasonable hours, and no business of any nature is transacted with the general public, it may refuse to accept express packages, especially so if the doors of the vault are locked and the officers, who alone are authorized to transact the business of the bank, have left the place of business.[1]

[1] Merwin *v.* Butler, 17 Conn. 138.

CHAPTER XXXVI.

BANKS LENDING CREDIT.

§ 248. When prohibited by law.

Banking associations from the very nature of their business are prohibited from lending credit. They cannot for compensation or as an accommodation for others become an accommodation indorser.

They have no authority to become or obligate the bank as a surety upon a bond for an individual.

The president of a bank has no power inherent in his office to bind the bank by indorsement for others.

The indorsement or guaranty of accommodation paper will be void in the hands of any person taking the same with notice.

In the case of National Bank of Commerce v. Atkinson, 55 Fed. Rep. 471, the court says:

"There is no doubt but what the law is that a national bank cannot loan its credit or become an accommodation indorser. On that question the decisions are uniform. It is also true that the president of a bank has no power inherent in his office to bind the bank by the execution of a note in its name; yet the power to do so may be conferred upon him by the board of directors either expressly, by resolution to that effect, by subsequent ratification, or by acquiescence in transactions of a similar nature, and of which the directors have knowledge."

In the case of Bowen v. Needles National Bank, 94 Fed. Rep. 925, the circuit judge says:

"It may be stated in general that no banking corporation has the power to become a guarantor of the obligation of another, or to lend its credit to any person or corporation, unless its charter or governing statute expressly permits it. Citing Farmers and Merchants' National Bank v. Butchers and Drovers' Bank, 16 N. Y. 125; Morford v. Bank, 26 Barb. 568; Thompson's Corp. § 5721. Under section 5136 of the Revised Statutes, national banking associations are given the power to 'make contracts' and 'to exercise by its board of

directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.' There is in these provisions no grant of power to guarantee the debt of another, nor can such guaranty be said to be incidental to the business of banking. It has been so held in Seligman v. Bank, 3 Hughes, 647; Fed. Cas. No. 12,642; Norton v. Bank, 61 N. H. 589, and Bank v. Pirie, 27 C. C. A. 171; 82 Fed. Rep. 799."

§ 249. Where a bank may make a guaranty.

In the case of Peoples' Bank v. National Bank, 101 U. S. 181, the case is stated in the syllabus as follows:

"A made his promissory note to his own order, duly indorsed it to the order of B, and delivered it to a national bank. The latter negotiated it to B, and applied the proceeds thereof to the cancellation of a prior debt of A. With the knowledge and consent of the president and cashier, who were also directors, but without any notice to or authority from the board, C, one of the directors and vice-president of the bank, guaranteed, at the time of the transaction, the payment of the note at maturity by an indorsement thereon to that effect in the name and on the behalf of the bank. The note was duly protested for non-payment, and the bank notified thereof. B brought this action against the bank. Held: 1. That the bank was not prohibited by law from guaranteeing the payment of the note. 2. That it is to be presumed that C had rightfully the power he assumed to exercise, and the bank is estopped to deny it. 3. That the bank by its retention and enjoyment of the proceeds of the note, rendered the act of C as binding as if it had been expressly authorized."

In the case of Seeber v. Commercial National Bank, 77 Fed. Rep. 957, it is held that a contract by a national bank to indemnify one for loss incurred as surety on an attachment bond, is not void on the ground of public policy; the loss having occurred, though the bond is not given for the benefit of the bank.

A written guaranty of the payment of a note "with all legal or other expenses of or for collection" executed by the indorser before maturity of the note, covers reasonable attorney fees incurred in the collection of the debt.[1]

§ 250. Guaranty of bank — Acts ultra vires.

The act of Congress authorizing the organization of national banks confers upon them no authority, by expressed terms or by implication, to guaranty the payment of debts contracted by a third person and solely for his benefit. All acts of this nature executed by the cashier or the board of directors are *ultra vires*.[2]

Where the defendant, a national bank in California, agreed with the plaintiff in New York to pay any checks drawn upon it by one "B." Upon the faith of this promise, plaintiff honored several such checks, which were paid in the following manner: Defendant made its cashier's checks upon the "C" National Bank in New York, at which bank it had no fund, and sent them to plaintiff, at the same time sending the "C" National Bank drafts on "B" to cover its checks. Later, certain of these cashier's checks proved worthless — the drafts not being collectible, and were not presented to "C" National Bank, but no prejudice to defendant by reason of such nonpresentment was shown. Held, the promise of the defendant bank was *ultra vires* and void as to the plaintiff, he being chargeable, under the circumstances, with notice of the fact giving rise to the illegality.[3]

1 McGhee *v.* Importers & Traders' Nat. Bank, 93 Ala. 192.

2 Commercial Nat. Bank *v.* Pirie, 82 Fed. Rep. 799.

3 Bowen *v.* Needles Nat. Bank, 87 Fed. Rep. 430.

CHAPTER XXXVII.

NOTES AND ACCEPTANCES.

§ 251. When note made payable at bank — Duty of bank.

The general rule laid down in the case of Indig v. National City Bank, 80 N. Y. 100, is that when the note of a depositor is made payable at a bank where he does business, that when the note falls due, if the bank is in funds, it is the duty of the bank to pay the same.

It is the duty of the bank to pay checks when drawn upon it by its depositors, but unless the maker of the note has authorized the bank to pay the same when presented, the later and better rule is that the bank is not bound to do so, neither is it the duty of the bank to pay the same.

If the bank is made the agent of the maker of the note, the authority exists, and then it is bound to pay a note when presented, if it is in funds.

In Illinois the Supreme Court in the case of Ridgely Bank v. Patton & Hamilton, 109 Ill. 479, says that a banker has no right to apply money on deposit to the payment of a note of the depositor payable at the bank without the order or check of the depositor. Citing Wood & Co. v. Merchants' Savings Loan and Trust Co., 41 Ill. 267.

In Indiana, in the case of the Second National Bank of Lafayette v. Hill *et al.*, 75 Ind. 223, the courts holds that:

Syllabus.

"In an action by a bank upon a promissory note, the sureties answered, alleging that the note was given for money borrowed from the bank by their principal, and that they were sureties only therein, which the bank knew at the time the note was executed; that prior to its maturity the principal consented and directed the bank to allow and pay the note after its maturity, out of his general deposits therein; that after its maturity the bank had, of the funds of the principal on deposit, more than sufficient to pay the note and interest; that the bank failed to apply the funds of the principal so

deposited in payment of the note, but subsequent to its maturity suffered the principal to check his funds out of the bank. Wherefore, they claim that they are released.

"Held, on demurrer, that the answer was insufficient.

"Held, also, that the failure of the bank to apply to the payment of the note the money which the principal had on general deposit in the bank at and after the maturity of the note did not discharge the sureties.

"Held, also, that the bank had a right to apply the money which the principal had on general deposit after the maturity of the note, to its payment, with or without the consent or direction of the principal, but that the checks subsequently drawn by him were a withdrawal of his previous directions upon the subject."

A leading case and one reviewing many of the authorities discussing this subject, is the case of Grissom v. The Bank, 87 Tenn. 350. A summary of the court's opinion in this case may be stated as follows:

"The fact that a note is made payable at a bank does not (without more) confer authority upon the bank to pay the note when due to and presented by a third person out of funds standing on deposit to the credit of the maker at maturity of the note."

Custom.

"Custom to authorize such payment must be general, uniform, and certain and known to both parties. They are presumed in such case to contract with reference to such custom."

§ 252. Set-off — Estoppel.

"Where a bank has without authority paid a note on which its depositor is accommodation indorser, it is estopped to claim such payment as is set off against the depositor, where by reason of the bank's failure to give notice of the payment, the indorser is deprived of effectual recourse against his principal."

In the case of Bank v. Peltz, Appellant, 176 Pa. St. 513, the court lays down a modified or optional rule and states it as follows:

"The bank may apply the deposit to the payment of the note, yet it is not in general bound to do so, but where the

bank holds funds of the maker when the note matures it is bound to consider the interests of the indorser or sureties, and if it allows the maker to withdraw his funds after protest and the indorsers are losers thereby, the bank is liable to them."

The court then proceeds to justify its opinion and says: "The reason of the rule is that the maker is the principal debtor and liable to all the indorsers whose undertaking is to pay if he does not."

The court, in further discussion of this question, says: "While a bank which is the holder of a note and has on deposit at the time of maturity a sum to the credit of any party liable to it on the note sufficient to pay it, and not previously appropriated by the depositor to be held for a different purpose, may apply the deposit to the payment of the note, yet it is not in general bound to do so. The cases where the right becomes a duty on the part of the bank rest on the special equity of the party, usually the indorser, to have the payment enforced against the depositor as the one primarily liable. Commercial National Bank v. Henninger, 105 Pa. St. 496. And even in these cases all the circumstances enumerated must exist. Thus the deposit must be sufficient at the time of maturity of the note. Subsequent deposits will not raise the duty. People's Bank v. Legrand, 103 Pa. St. 309; First National Bank v. Shreiner, 110 Pa. St. 188. And the deposit must not have been previously appropriated to any other use. Cases cited, *supra*, and German National Bank v. Foreman, 138 Pa. St. 474, where the principle was conceded, though an exception of doubtful correctness was made against a mere notice from the depositor not to pay, unaccompanied by a specific appropriation to a different purpose. And lastly the deposit must be to the credit of the party primarily liable. The rule is thus stated by our brother, Williams, in the latest case on the subject. Mechanics' Bank v. Seitz, 150 Pa. St. 632. 'The general rule is well settled that, while the bank may appropriate funds in its hands belonging to any previous party to the note, to the payment of it, * * * yet it is not bound to do so. The note may be treated as, in effect, an order or check authorizing the bank to apply the deposit to the payment, but the deposit is not payment in law. * * * But where the bank holds funds of the maker when the note

matures, it is bound to consider the interests of the indorsers or sureties, and if it allows the maker to withdraw his funds after protest, and the indorsers are losers thereby, the bank is liable to them. The reason of this rule is, that the maker is the principal debtor and liable to all the indorsers, whose undertaking is to pay if he does not.' "

This subject is again discussed in the case of National Mahaime Bank v. Peck, 127 Mass. 298.

Where the rule we believe is correctly stated. The court, in its opinion, says: "Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only, but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. Foley v. Hill, 1 Phil. 399 and 2 H. L. Cas. 28; Bank of Republic v. Millard, 10 Wall. 152; Carr v. National Security Bank, 107 Mass. 45. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks and liable to an action by him if it does not. When he owes to the bank independent debts already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterward insist that it should have been so applied. The bank being the absolute owner of the money deposited and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in Baker v. Briggs, 8 Pick. 122, and American Bank v. Baker, 4 Met. 164, cited for the defendant. The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety. Glazier v. Douglass, 32 Conn. 393; Field v. Holland, 6 Cranch, 8, 28; Brewer v. Knapp, 1 Pick. 332; Upham v. Lefavour, 11 Met. 174; Bank of Bengal v. Radakissen Mitter, 4 Moore P. C. 140, 162.

"The general rule accordingly is that where moneys drawn out and moneys paid in or other debts and credits are entered by the consent of both parties in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account, but where by express agreement or by a course of dealing between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker. Clayton's Case, 1 Meriv. 572, 610; Bodenham v. Purchas, 2 B. & Ald. 39, 45; Simpson v. Ingham, 2 B. & C. 65; S. C., 3 D. & R. 249; Pemberton v. Oakes, 4 Russ 154, 168; Pease v. Hirst, 10 B. & C. 122; S. C., 5 Man. & Ryl. 88; Henniker v. Wigg, Dav. & Meriv. 160, 171; S. C., 4 Q. B. 792, 795; Strong v. Foster, 17 C. B. 201; Martin v. Mechanics' Bank, 6 Harr. & J. 235, 244; State Bank v. Armstrong, 4 Dev. 519; Commercial Bank v. Hughes, 17 Wend. 94; Allen v. Culver, 3 Den. 284, 291; Newburgh Bank v. Smith, 66 N. Y. 271; Voss v. German-American Bank, 83 Ill. 599."

§ 253. Makers right of set off.

While the rule is that the bank may apply the deposit in payment of the matured note, especially when authorized so to do, the maker of a note can compel it to do so, and an assignment by the bank of a note before its maturity does not prevent the depositor and maker of the note from claiming the right of set-off.[1]

§ 254. Special deposit, when accepted to pay note.

When a customer makes a special deposit in a bank, of funds for the purpose of paying notes made by him, and which may be from time to time presented to the bank for payment, it becomes a deposit which cannot be used by the bank for any other purpose. Such funds are held by the bank more in the nature of trust funds and must be applied as directed by the debtor. A special deposit cannot be used to pay a note due the

[1] McCagg *v.* Woodman, 28 Ill. 84.

bank unless when the deposit was made it was understood and intended to be used for such purposes.[2]

§ 255. Money deposited with bank to pay note is not payment.

In the case of St. Paul National Bank v. Cannon, 48 N. W. Rep. 526, it appears that money due on a note which was payable at a certain bank was deposited in the bank at the maturity of the note with directions to pay it; held, that the deposit is not a payment. The court, in discussing the question, says:

"It is alleged in the answer that at maturity Loeffelholz did pay the note at the Bank of Minnesota "by depositing and leaving with said bank a sum of money sufficient to pay said note and mortgage, and then and there instructing said bank to pay said money to the lawful owner thereof."

"It is admitted that the money was paid to the Bank of Minnesota by Loeffelholz. The note was not at the bank, but was then held by the plaintiff as collateral security. Although the note was by its terms payable at the Bank of Minnesota, the mere depositing the money in that bank, in order that it might be applied in payment of the note, did not constitute a payment of it. In such a case the bank receiving the money is to be regarded as the agent of the person paying it, the holder of the note not having deposited it at the designated place for collection or payment. The law is well settled. Adams v. Improvement Commission, 44 N. J. L. 638; Hill v. Place, 48 N. Y. 520; Caldwell v. Cassidy, 8 Cow. 271; Gas Co. v. Pinkerton, 95 Pa. St. 62; Wood v. Savind, etc., Co., 41 Ill. 267; Caldwell v. Evans, 5 Bush (Ky.), 380; Ward v. Smith, 7 Wall. 447; Freeman v. Curran, 1 Minn. 169 (Gill. 144); 3 Rand Com. Paper, § 1119, and cases cited."

§ 256. Application of deposit on note.

It has been held that where a bank holds a note of a depositor it is not bound to immediately upon the maturity of the note apply the funds of the depositor in payment of the same.

A bank having money on open account to the credit of a maker of a note, which it holds, is not obliged to apply the

2 Stebbins *v.* Lardner, 48 N. W. 847: Hall *v.* Marston, 11 Mass. 575.

money thereon before bringing suit, even if it has the right to make such application without consent.[3]

Where the depositor has authorized the bank to pay his note when presented and the bank acting under such directions pays the same, applying all of the funds to his credit then in the bank and advancing an amount in addition thereto necessary to pay the same, the amount so advanced is like an overdraft and may be recovered from the maker of the note.

[3] Doctor and others *v.* Riedel and another, 96 Wis. 158.

CHAPTER XXXVIII.

COLLECTIONS BY BANKS.

§ 257. Subject treated — Duty of bank.

In the presentation and treatment of this subject the object directly in view is to give general direction and the rules of law as to the duties and liabilities of the bank in accepting and making collections.

If it receives the collection it becomes responsible and must return the same or the proceeds derived therefrom, or render a good and sufficient cause in failing to do either.

The first question presented to the banker after receiving the collection, is to determine what are his duties. This is established by the indorsement and instructions accompanying the collection.

§ 258. Relationship existing between the parties.

As between the parties, a deposit of commercial paper for collection, and the bank receiving it, the position is held, by a number of leading authorities to be that of bailor and bailee.

This position, however, is by many of the courts denied, and the relationship arising by the deposit of commercial paper with a bank for collection, is held to be that of principal and agent.

The first question presented to the banker by the deposit of commercial paper for collection, is the practical one: "How are collections received?"

The contract entered into between the parties at the time of receiving the collection, which prescribes the duties of the collecting bank, governs and establishes their relationship.

A collection may come into the possession of the bank either by the owner personally presenting the same or it may be received through the mail from a person or bank transmitting the same. In either case, when received by the bank, the first duty of the bank is to scutinize every such instrument carefully before its entry upon the bank's collection register.

The purpose of this close scrutiny is to determine if possible whether the note or instrument has been disfigured or in any way changed after its issue by the drawer. If, upon examination (the collection being a note), it appears that it is irregular, it should not be accepted and entered upon the collection register.

If notes or collections are presented by strangers they should be held for investigation before acceptance and entry and at the time and before the acceptance they must be properly indorsed.

§ 259. Indorsement.

The language used controls, governs and directs the bank and establishes its relationship with the owner of the paper. The form of the indorsement either makes the bank a bailee of the collection or an agent representing the owner.

In commercial law an indorsement is defined to be "that which is written on the back of the instrument in writing and which has relation to it."

The indorsement does not necessarily have to be made upon the back of the instrument. It may be made upon the face of the instrument and this does not in any way affect or destroy its legality.

The indorsement is made primarily for the purpose of transferring the rights of the holder of the instrument to the bank.

It is sometimes made for additional security, and consequently there are several kinds of indorsements. They are defined as follows:

"*First.* An indorsement in full or a special indorsement is one in which mention is made of the name of the indorsee.

"*Second.* A conditional indorsement is one made separate to some condition, without the performance of which the instrument will not be or remain valid.

"*Third.* A blank indorsement is one in which the name of the indorser only is written upon the instrument.

"*Fourth.* A qualified indorsement is one which restrains or limits or qualifies or enlarges the liability of the indorser.

"*Fifth.* A restrictive indorsement is one which restrains the negotiability of the instrument to a particular person or for a particular purpose."

The note or instrument bearing an indorsement which may be one of the above described, the bank receiving the same should examine the indorsements carfully and mark on each note the date of its maturity. This is very important, for if the due date of the note should be entered or marked a day too late, the drawer failing to pay, the bank would be held by the error, as the notice of protest to the indorser would be too late to hold him.

The notes after being "timed," as stated, are recorded or should be recorded in what is known as the "collection register," and usually from this book the notes are copied into the "tickler."

A bank may have what is called a "foreign collection register," in which all notes, checks or drafts which are payable in another place are registered.

The collection having been duly indorsed, and the bank receiving and accepting it, assumes the duties imposed upon it by law to undertake to make the collection.

The bank, as previously stated, is governed as to its duty, as to the treatment of the instrument by the nature of the indorsement, and the law which imposes certain obligations upon it.

§ 260. Nature of relationship between the parties.

As previously stated, when a collection is received and accepted by the bank, the relationship between the parties is fixed by the indorsement of the instrument. In such a case the law defines the duty of the bank.

A special agreement may be entered into at the time of the acceptance of the collection specifically defining by instructions the duty of the bank, which agreement, in relation to the collection, must be strictly complied with.

§ 261. When a bank becomes bailee.

A bailment, as defined by Professor Joel Parker, "is a delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished."

A bailment is generally defined as a deposit or commission without recompense.

A bank does not usually, however, perform collections gratuitously; and the courts do not construe and regard the undertaking of a bank to collect commercial paper gratuitously.

The United States Circuit Court of Appeals, discussing this questions, says: "Where the statement of facts shows that a city treasurer deposited checks in the bank indorsed by him for deposit, and the checks were immediately credited to him, but had no agreement that his checks should be treated as cash, or that he could draw against them before collection, and the bank became insolvent before the checks were collected, and their proceeds passed into the hands of the receiver, held, that no title passed to the bank, except as a bailee, and that the depositor was entitled to the proceeds."[1]

A bank becomes a bailee when it is accustomed to keep securities, whether authorized to do so by its charter or not, and is held liable for their loss by gross negligence.

A bank becomes a bailee when it receives personal property, agreeing with or without a consideration to keep the property and return it to its bailor, and is liable for gross negligence when the keeping of the property is gratuitous.[2]

Bailment may include the performance of services upon the part of the bailee, as, for example: A delivery of a thing (a negotiable instrument) in trust (to a bank) upon a contract expressed or implied that it collect the same. If the bank accepts the note only for collection, it becomes a bailee of the instrument and must execute the trust, and, if possible, make collection of the paper, for which the court will allow it a reasonable compensation.

The bank is a bailee until the note is collected. When the position changes, and after collection, the proceeds or funds, when authorized by the owner, may be placed to the credit of the owner of the collection, who then becomes a depositor of the proceds, and the bank a debtor to him for such proceeds.

A bailment being defined strictly is the acceptance of personal property to be held according to the purpose or object

[1] Beal, Receiver, *v.* City of Somerville, 50 Fed. Rep. 647.

[2] Edwards on Bailment, § 78.

of the delivery and returned again when that purpose is accomplished.

The placing of a note for collection with a bank where the indorsement is a restrictive one, for example, "Endorsed for collection," the placing of the note and acceptance by the bank is held to be a bailment of the instrument. The duty of the bank, having accepted the instrument, is to proceed to the collection of it. If the bank, under the instructions, collects the note, the proceeds belong to the owner and must be held by the bank as a special deposit and returned to the owner upon demand, less the reasonable expenses which may be allowed for collection. When the collection is made and the funds are in the possession of the bank, as before stated, the legal position of the bank may be changed from that of bailee to one of debtor; but the bank has no right to change its position and establish this relationship, unless authorized by the owner of the collection.

If the indorsement of the instrument, when delivered to and accepted by the bank, reads as follows: "Endorsed for collection and credit," the bank, upon collection of the instrument, has the direct authority to place the funds so collected to the credit of the owner, and in such a case the bank may be considered the agent of the owner and the position be changed by the nature of the indorsement of the instrument from that of bailor and bailee to that of agent.

The case of Scott v. The Ocean Bank in the City of New York, 23 N. Y. 289, seems to be directly in point. The opinion of the court is as follows:

"The facts found by the learned justice, who tried this case without a jury, do not justify his conclusions of law that the bill in question on the receipt thereof by the Ohio Life Insurance and Trust Company became, as between it and James Lyell, on whose account it was received, the property of the company and could be used by it as its other funds were used. It is not shown nor claimed that there was an express agreement between the company and Lyell that he should, on the receipt by it of the bills remitted, be entitled to have a credit in the account between them for the amount thereof; nor is it found that in the course of the dealings between them any

credit was in fact ever given to him for any of such bills till the proceeds thereof were realized and received. All that is found in relation to such dealings is that Lyell, who was a banker at Detroit and kept an account with that company at its office in the city of New York, made from time to time, between June, 1857, and the 24th of August in that year, remittances to it and drew drafts upon it; that he was a large depositor with it of money and bills; that there was an arrangement between him and it that he should be allowed interest at the rate of 4 per cent. per annum on his average balances, and that on the said 24th day of August, on which day the company failed and suspended payment, Lyell had standing to his credit on the books of the company a cash balance of $108,483.50, exclusive of the bill in question; that such bill was received by the company in the usual course of business on the 20th day of August for account of Lyell, who had been in the habit of remitting in the same way that this was; that the bill was on the day of its receipt accepted by the drawees on presentation and returned to the company, in whose possession it remained till its transfer to the defendant on the twenty-fourth day of the same month, and that Lyell had at that time not been credited with said bill by the company; but after the commencement of this action the bookkeeper of the assignees of the company, without the knowledge of Lyell or the plaintiff, credited Lyell with the proceeds thereof in his account with the company.

"The only other fact bearing on this point is that after the stoppage of the company in New York it continued to do business in Cincinnati, Ohio, and that Lyell drew his drafts on it from time to time during the month of September, 1857, to the amount of $98,236.84. This course of dealing, and the arrangement referred to for the allowance of interest to Lyell on his average balances, would, it is conceded, create the ordinary relation of debtor and creditor between the company and Lyell in respect to the money received by it; but no inference can be legally drawn therefrom, that the bills so remitted were credited, or were intended to be credited, as cash on the receipt thereof, or that the company ever paid or were bound to honor drafts on account of the same until paid. Lyell was a depositor of money as well as of bills, and although 'he made

remittances to the said company and drew drafts upon it,' it does not follow from those facts alone that the drafts were drawn on account of or were limited to the remittances, nor if they were, that they might be made for the bills remitted before collection, as well as the money. No reasons are disclosed in the case from which it can be reasonably inferred that the company would consent, or had any inducements to consent to treat as cash, and make itself debtor for, every bill that might be remitted to it, without reference to the standing and responsibility of the parties, which in many cases might be unknown, especially when Lyell himself, as in the case of the bill in question, was not a party to such bill. It is more reasonable to assume that it would at least reserve the right to elect, whether to give credit absolutely or not before the proceeds were realized; and until such election was made, and credit was in fact given therefor, the bill would be held by it as the property of Lyell, and not its own. When, therefore, it appears that the bill in question was retained in the possession of the company after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is disclosed in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account before its collection, or that Lyell ever drew, or was entitled to draw, upon the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be considered that the company at the time of the transfer stood in the relation of agents for its collection merely. There is no ground based on those dealings (and no other is claimed), for the conclusion that the ordinary relation of debtor and creditor between the company and Lyell, in relation to the bill in question, existed, or that it had become as between them the property of the company. *Lyell consequently continued to be the owner of it at the time of its transfer, and the defendants never acquired any right to it as against him or the plaintiff who had succeeded in his title.* The facts found by the court below show that they received it, with other securities, to secure a precedent indebtedness of the company to them, and that they neither advanced nor paid any new con-

sideration on receipt of this bill, and they only gave credit for its proceeds after it was paid, in extinguishment of so much of the defendant's account against the company. The defendants, therefore, were not *bona fide* holders thereof for value, and are not entitled to its proceeds as against the plaintiff. It follows, that the judgment of the Superior Court at special term was erroneous, and that the order for a new trial was properly granted, and the plaintiff under the stipulation is entitled to judgment absolute."

The court, in the case of Jones *et al.* v. Kilbreth, 49 Ohio St. 413, holds that:

"When paper is deposited for collection, the relation between the depositor and bank is that of principal and agent. If an agent for that special purpose, collects or sells the paper of his principal, he becomes a fiduciary, and will hold the proceeds in trust for the principal, and if the agent fails, there will be no reason why his general creditors should invade such proceeds to satisfy their claims, if the principal can trace or ascertain his property in the substituted form. Whether, in a given case, the proceeds have been sufficiently traced and identified, must rest in the judgment of the chancellor who is called upon to declare the proceeds subject to a distinct trust."

The court here declares that the relation, where drafts were deposited with a bank for collection, is that of principal and agent, and then contends that the agent collecting the funds holds them in trust for his principal and that if the agent fails while holding such funds, his creditors should not invade such proceeds to satisfy their claim. In this case, drafts were indorsed for "collection," which language, under the theory that the relation is one of principal and agent, would allow the agent to place the funds in the bank to the credit of the owner, which position would make the bank a debtor.

The language of the court seems more clearly to establish the relation between the parties as one of bailor and bailee. For the court holds *that the funds are trust funds*, and the law holds that the bailee must either return the thing bailed or its value.

The law defines the duties of a collecting bank, and where a special contract by assignment of the instrument or other-

wise, in relation to the collection is entered into, the bank is bound to obey instructions.[3]

§ 262. Paper payable at a specific bank.

Where a note is made payable at a bank and is placed or left there with instructions from the owner to collect and credit him, the bank, after collecting, becomes a debtor to the owner of the collection.

When the bank makes the collection and places the proceeds to the credit of the owner, its duties and responsibilities are ended.

Where an instrument payable at a bank is placed with it by the owner for collection, the bank becomes the agent of the payee and is authorized to receive payment.

If, however, the note is payable at the bank but is not left there for collection, a payment to the bank is not payment of the note. The bank in this case acts as the agent of the payor. The naming of a bank as the place of payment designated in a promissory note does not create an agency and give the bank power to collect the note; but if the bank accepts payment, having no authority to collect, it acts only as agent for the payor, and in receiving the money and canceling the note without authority first received from the payee it becomes liable to the payee in case of loss.[4]

A bank is not authorized to receive the money for the payee by reason simply of the fact that the note is payable there.[5]

If a bank accepts money in payment of a note which is made payable at its place of business, it acts as the agent of the payor and the money so received becomes a special deposit, and in case of loss through gross negligence, of a special deposit made in it with the knowledge and acquiescence of its officers and directors, it becomes liable.[6]

In the case of Bank of Montreal v. Ingerson, 105 Iowa, 349, it is held that where a bank had secured its indebtedness to a creditor bank by putting up notes signed by third persons and payable to and at debtor bank, that the debtor bank had no

385; Wingate v. Mechanics' Bank, 10 Pa. St. 107; Power v. First Nat. Bank, 6 Mont. 250.

[3] Mechanics' Bank v. East, 4 Rale,

[5] Cheney v. Libby, 134 U. S. 68.

[6] National Bank v. Graham, 100 U. S. 699.

[4] Ward v. Smith, 7 Wall. 447.

authority to receive payment for notes in the hands of creditor bank.

Where a bank is named as the place of payment of a promissory note, if the debtor was ready at the time and place named to pay it and the bank refused to accept payment, such readiness is equivalent to a tender and an answer pleading that fact and payment of the money then due into the court, will be a bar to the recovery of interest and cost but not to the cause of action.[7]

§ 263. Law of place governs relation.

It is laid down as a general rule that the law of the place of the performance of a contract for collection governs it.

In the case of Kent v. Dawson Bank, Fed. Cas. No. 7714, the court says:

"The place of performance of a contract is generally a controlling consideration by which to determine the *lex loci contractus*, and where, as here, the contract is both made in North Carolina and was to be performed there, it is clear that the case must be controlled by the law of that State."[8]

§ 264. Usage and custom.

A custom is not binding upon the parties affecting collections unless it is general as to place. It must also be certain and uniform. It must be known to both parties. It may be so general that both parties are presumed to know it.

A custom which is contrary to public policy cannot prevail.

In the State of California the courts hold that where one gives a draft to a bank to collect, he is held to have an *implied knowledge* of its usage in making collections so far as such usage does not contravene any rule of law.[9]

In the case of Jefferson County Sav. Bank v. Commercial Nat. Bank, 39 S. W. 338, the court holds, that in the absence of special directions where a principal selects a bank as his collecting agent, he is bound by a reasonable usage prevailing and established among the banks at the place where the collection is to be made. Knowledge of the usage may not be

7 Hills *v.* Place, 48 N. Y. 520.

8 St. N. Bank *v.* S. N. Bank, 128 N. Y. 26.

9 Davis *v.* First Nat. Bank of Fresno, 118 Cal. 600.

known to the principal but as the law is applied in California he is bound by such usage.

The effect of local usage and the question of reasonableness are so very clearly presented in the opinion of the court, it is cited in full:

Opinion.

"This cause was tried upon a statement of agreed facts. Those essential to its present determination are as follows, to-wit: The complainant and defendant were corporations engaged in general banking operations — the one in Birmingham, Ala., and the other in Nashville, in this State. They were at the time of the transaction, out of which this controversy arose, and had been for a considerable period antecedent, engaged in a mutual correspondence, as the exigencies of their business required or suggested. In the course of this correspondence, the complainant bank, as owner and holder, forwarded to the defendant bank for collection, a note for $940, drawn by Loventhal & Son, to the order of and indorsed by J. C. Marks & Co., and also a draft for $1,352, drawn by J. C. Marks & Co., and accepted by Sulzbacker Bros., both due and payable on Saturday, June 20, 1891. At 2 P. M. of the day of its maturity, the maker of the note and the acceptor of the draft tendered in payment thereof, to the teller of the Commercial National, their checks for the respective amounts due thereon, drawn on and properly certified by the Nashville Savings Bank (a banking corporation of good standing in Nashville); and these checks were accepted by this officer of the defendant, and the note and draft, after being stamped "paid," were delivered into the hands of the parties respectively entitled to them. This was done in accordance with a well-established usage or custom of the various banks of Nashville. The checks thus received were carried over to Monday, June 22d, on which day, at the hour of 11 A. M., they were presented to the Nashville Savings Bank for payment, this being the day and the hour, according to the custom and usage of the banks of Nashville, for their presentment. These checks were left with the Nashville Savings Bank for examination, according to another custom or usage of these banks, and at 2 P. M., of June 22d, they were returned unpaid to the defendant bank. At that

hour the Nashville Savings Bank closed its doors, and the Commercial National Bank at once caused the checks to be presented and protested for non-payment. It is agreed that the Jefferson County Savings Bank had no nowledge of any of these local customs or usages of the banks of Nashville, and was ignorant of the methods pursued by the defendant bank in regard to this paper, until informed thereof by subsequent correspondence. Efforts made to collect the amount of these checks out of the drawers having proved abortive, the result is that the draft and note have been wholly lost to their owner. The bill in this cause seeks a decree against the Commercial National Bank covering this loss, upon the ground that it had no right, in the absence of express authority, to receive in payment of this paper anything but money, and that it cannot excuse itself from liability for doing otherwise, by setting up a local custom or usage of which the complainant was wholly ignorant. The Court of Chancery Appeals held to this view, and accordingly entered a decree in favor of complainant for the full amount of the note and draft, with interest added.

"In this decree there was error. The rule which that court invokes as decisive of this case — that is, that an agent, in the want of express authority, cannot accept anything in discharge of the principal's debt except money — is well settled, and has been frequently announced in such cases as Walker v. Walker, 5 Heisk. 425, but it does not control in a case like the present. A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge or want of knowledge of its existence. Sahlien v. Bank, 90 Tenn. 221, 16 S. W. Rep. 373; Howard v. Walker, 92 Tenn. 452, 21 S. W. Rep. 897. This rule regulating the relations of collecting banks to parties who take advantage of the means which they offer in this respect, is founded on sound reason. Every business man knows that in the constantly increasing volume and variety of banking transactions, the larger number of which are settled or disposed of by a simple exchange of credits, methods have been adopted by bankers to economize labor, reduce risks, and simplify dealings with one another,

and with their customers. Some of these methods are of a general character, while others are dictated by local convenience or necessity. That these methods prevail is a fact of such public notoriety that no business man can well affect to be ignorant, and least of all, a banking institution. It is in view of this we have held that, in choosing a bank as a collecting agent, the principal impliedly agrees that the agency may be performed in accordance with such reasonable methods as sanctioned by experience, have ripened into usage, when such usage is not in contravention of a general law, and in this holding we are well supported by authority, as will be seen by reference to the cases already cited. The usages which were observed in the unsuccessful effort to collect the paper in controversy, and which are shown to have been established among the banks of Nashville, we find were reasonable and proper. It follows that the complainant was conclusively affected by them, although actually ignorant of their existence. The decree of the Court of Chancery Appeals is reversed and the bill is dismissed."

Where a customer has for a considerable length of time been dealing with a bank, indorsing to it for collection, checks, drafts, etc., and where such indorsements were general and not restricted, the bank, it has been held, may mingle the funds so collected with the general funds of the bank, and such a usage and custom has been sustained, but where a party not a regular customer of the bank and a stranger to the usage and custom prevailing in the place, indorses to the bank a collection without consideration, the bank has no implied authority or authority by usage and custom, when such collection is made by it, to place the funds with the general funds of the bank.

The funds should be held by the bank as a *collection* or a *special fund* until authorized by the owner to be placed to his credit in the general funds of the bank.[10]

§ 265. General rule as to title of paper.

The general rule is that the title of paper deposited with a bank for collection does not pass to it, but remains in the depositor.

The general rule, therefore, sustains the bailment theory.

[10] Freeman's Bank *v.* National Tube Works, 151 Mass. 413.

In the case of the First National Bank of Fort Worth, Texas, v. Payne, 42 S. W. Rep. 736, the court holds that where a note has been assigned to a bank for collection only, the bank cannot recover upon it.

It is generally understood that a mere deposit of a collection to a bank by the owner, does not pass the title or make the bank the purchaser of the paper.

The general rule as laid down by the Supreme Court in the State of Georgia is, that "where a promissory note was indorsed by the payee to another for collection" for the account of the payee, the indorsee had such a legal title as would authorize him to bring suit upon the paper in his own name.[11]

In the State of Iowa, in the case of Merchants' National Bank v. McNulty, 36 Iowa, 229, the court says:

"If the note was obtained without consideration as alleged, the payees could not recover thereon. The indorsee, Burton, and the subsequent holder, Hill, constitute the firm of Burton, Hill & Company, the payees, and hence held the note subject to the same defenses which might have been interposed against it in the hands of the payees. The plaintiff, if not a *bona fide* purchaser stands in no better position."

It is generally understood between the parties that a mere deposit "for collection" does not make the bank the purchaser of the paper or relieve the depositor where credit has been given.

There has been considerable contention and litigation upon this subject, but the weight of authorities supports the theory that it is a gratuitous favor and is not a banking custom.

In Georgia, a negotiable instrument deposited in a bank indorsed "for collection" remains the property of the depositor, which supports the bailment theory, and the same rule holds when the written indorsement appears unrestricted, but as a matter of fact evidence by express collateral agreement or understanding may be reasonably inferred from the course of dealing between the parties, the instrument is taken by the bank not as a purchase but for collection simply.

Where the bank gives the depositor credit for the amount of a negotiable instrument indorsed to it, the giving of credit

11 Wilson et al. *v.* Tolson, 79 Ga. 137.

is not conclusive evidence that the bank had purchased the paper and was not a mere bailee thereof.

The authorities hold that where a depositor is given credit upon checks, drafts, and negotiable instruments, indorsed to the bank for collection and he is allowed to draw checks against the same, but where such collections as are not paid and are deducted from the next deposit, such a course of dealing stamps the transaction with reference to the title to instruments so indorsed, as being unmistakably a bailment for collection simply and no greater title is vested in the bank.[12]

If, by the nature of the transaction, the bank becomes responsible to the depositor for the amount of the collection, the title of the paper vests in the bank.

In the case of Gibson v. City of Erie, 196 Pa. St. 7, the owner of municipal bonds who made a special deposit of them with the bank, which bank was the agent of the municipality, it is held, he does not lose his title thereto by reason of the bank collecting and paying over to him the proceeds of the interest coupons, and where the bank failed after using the money deposited with it by the city for the payment of the principal, held, that the owner is not estopped from recovery against the municipality.

§ 266. Form of indorsement controls title to collections.

If the owner of paper desires to retain the title to the collection, he should place a restrictive indorsement upon it. Such an indorsement would read "indorsed for collection." This kind of an indorsement destroys the negotiability of the paper.

The Supreme Court of the United States, in the case of The Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, says:

"The words '*for collection*' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them and warned the party that contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds."

And in White v. National Bank, 102 U. S. 658–661, where

12 Armour Packing Co. *v.* Davis, Receiver, 118 N. C. 548; National Butchers & Drovers' Bank *v.* Hubbell, 117 N. Y. 384.

the indorsement was "*for account*," the same justice, speaking of the indorsement, said:

"It does not purport to transfer the title of the paper or the ownership of the money when received. The plaintiff then, as principal, could have control of the paper at any time before its payment, and this control extended to such time as the money was received by its agent."

The court here cites: 117 N. Y. 384; 148 Mass. 553; 151 Mass. 413; 14 S. W. Rep. 411; 76 Ind. 561.

Where the paper is controlled by such a restrictive indorsement, the courts emphatically hold that it does not transfer the title of the paper or the ownership of the money when received.

Sustaining the doctrine that a collection made by a bank upon paper indorsed to it by restrictive indorsement cannot place the money so collected in the general funds of the bank, but must retain the same as previously stated as a special deposit or collection for the benefit of the owner.[13]

Where a negotiable instrument, then, is indorsed to a bank for collection and a restrictive indorsement is placed upon the paper, the bank does not become the owner of the paper, but receives the same for the purpose of collection only.

Where an instrument in the following language:

"Pay S. V. White or order, for account Miner's National Bank, Georgetown, Colorado.

"J. L. BROWNELL, President."

Which directs that the proceeds when collected shall be paid to a certain person, does not pass the title.

The Supreme Court of the United States, in the case of White v. National Bank, 102 U. S. 658, says:

"The language of the indorsement is without ambiguity and needs no explanation either by parole proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received."

The Appellate Court of the State of Illinois, in the case of

[13] Evansville Bank *v.* German American Bank, 155 U. S. 556.

Fawsett v. National Life Ins. Co. of U. S., 5 Ill. App. 272, where an instrument indorsed:

"Pay to the Second National Bank of Monmouth, for collection, for account of George F. Harding, executor of Abner C. Harding, deceased.

A. F. FAWSETT."

Held, that where a note is indorsed in a form showing an intention to pass all interest in the note, such indorsement imports a consideration, and wherever that is the case, the property in the instrument will be deemed to have passed absolutely to the assignee.

§ 267. Blank indorsement.

It may be stated that the general rule is that a blank indorsement by the payee or holder of a negotiable instrument carries the title to the bank.

The rule in New York and most of the States is, that where a customer doing business with a bank and having a general account therein, deposits a check, indorsing the same in blank and receives credit on his pass-book, the title to the check so indorsed passes to the bank. *However, where the customer understands and has notice of the fact that the paper was indorsed and delivered to the bank for collection only, the title will remain in the depositor.*[14]

§ 268. Power to collect may be revoked.

The owner of the paper at any time before the bank takes action, may revoke the authority of the bank from proceeding in the collection.

This is upon the analogy that the bank is acting as an agent.

If the bank persists in the collection, it may be restrained by an order of the court.

The power to revoke the collection cannot be enforced, however, if the bank has acquired a lien upon it. The lien gives the bank an interest in the property, and if the collection has matured it is the duty of the bank to collect.

If the bank becomes insolvent, its power to collect is revoked.

[14] Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530; Brooks v. Bigelow, 142 Mass. 6; Bank of Republic v. Millard, 10 Wall. (U. S.) 152.

But where a bank has brought suit and has entered upon the process of collecting, its authority cannot be revoked unless it is shown that it obtained authority unlawfully.

It is claimed that the authority of the bank may be revoked after it has entered on the process of collection if it fails to take the steps necessary to recover the collection.[15]

§ 269. Bank lien upon collections.

The Supreme Court of the State of Michigan, in the case of Gibbins v. Hecox, reported in 63 N. W. 519, lays down the general rule to be that a bank has a lien on all money, notes and funds of a customer in its possession for any indebtedness of a customer to the bank which is due and unpaid.

The court says:

"The reason given for allowing the lien is, that any credit which a bank gives by discounting notes or allowing an overdraft to be made, is given on the faith that money or securities will come into the possession of the bank in the due course of future transactions."

The court, in its opinion, cites the case *In re* Farnsworth, 5 Biss. 223, Fed. Cas. No. 4673, stating:

"Judge Blodgett of the United States Circuit Court of Illinois held that, a bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it, for collection after the giving of the note, though collected after the filing of petition in bankruptcy and can apply such proceeds upon the note."

The court then cites from the case of Muench v. Bank, 11 Mo. App. 144, which court says:

"The general lien of bankers is part of the law merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account is undisputed. A banker's lien does not arise on securities deposited with him for a special purpose, otherwise we have no doubt that when a discount has been made by the bank, and the note has matured, so as to create an indebtedness from the depositor of the bank, all funds of the depositor which the bank has at the date of the maturity of the discounted note, or which it afterward acquires in the course of business with

15 Bank of Mobile *v.* Huggins, 3 Ala. 206.

him, may be applied to the discharge of his indebtedness to the bank; and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right and placed by him with the bank for collection."

A corresponding bank receiving a collection with the statement that the collection belongs to "A." and not to the bank remitting the same, the correspondent bank cannot acquire a lien against the collection for a debt which the forwarding bank may owe to it.[16]

But if the correspondent bank has no notice, but receives the collection as the property of the remitting bank, the correspondent bank has a lien for a debt that may exist between them, the rule may then be safely stated that a bank holding a collection as between the owner and itself, it cannot acquire a lien upon the collection or proceeds unless the debt existing from the owner of the security to the bank was, at the time the collection was made, a matured debt.

And, as between the correspondent bank and its agent, the agent cannot acquire a lien where the collection is sent and indorsed "for collection."

A letter accompanying a collection (which collection bears a general indorsement) which explains a blank indorsement, would also be held as notice to the collecting bank.

The rule may be again stated that a bank cannot acquire a lien against a collection in any instance where the title of the paper remains in the owner.

§ 270. Authority of bank to make collections.

When a collection is received by a bank, it not only has the implied authority to collect which is granted to it in the general power to do a general banking business, but it may be said that it becomes a duty.

The principle that the power is implied requires no discussion.

The character of the business of a commercial bank suggests and requires it to perform the business of making collections.

The National Banking Law does not specifically designate

16 Bank of Metropolis v. New England Bank, 1 How. 234.

the business of making collections a provision of the statute, but the business itself forms a large branch of the banking business and its power is not denied.

Held, in case of First Nat. Bank of Fort Worth, Texas v. Payne, 42 S. W. 736, that plaintiff bank can not recover upon a note assigned to it merely for the purpose of collection. But see First Nat. Bank v. Hughes (Cal.), 46 Pac. 272.

The rule as laid down by the Supreme Court of the United States as to the liability and duty of the collecting bank where it receives drafts and other collections from its customers and for defaults of its agents, the court after discussing the decisions of the various States presents the rule to be as follows:

"The question involves a rule of law of general application. Whatever be the proper rule it is one of commercial law. It concerns trade between different and distant places, and, in the absence of statutory regulations or special contract or usage having the force of law, it is not to be determined according to the views or interests of any particular individuals, classes, or localities, but according to those principles which will best promote the general welfare of the commercial community. Especially is this so when the question is presented to this tribunal, whose decisions are controlling in all cases in the Federal courts.

"The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark bank for collection. This distinction is manifest; and the question presented is, whether the Newark bank, first receiving these drafts for collection, is responsible for the loss or damage resulting from the default of its Newark agent. There is no statute or usage or special contract in this case, to qualify or vary the obligation resulting from the deposit of the drafts with the New York bank for collection. On its receipt of the drafts, under these circumstances, an implied undertaking by it arose, to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder against previous parties to the paper. From the facts found, it is to be inferred that the New York bank took the drafts from the plaintiff, as a customer, in the usual course of business. There are eleven drafts in the case, running through

a period of over three months, and the defendant had previously received from the plaintiff two other drafts, acceptances of which it had procured from Conger, at Newark, through the Newark bank. The taking by a bank, from a customer, in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service. The general profits of the receiving bank from the business between the parties, and the accommodation to the customer, must all be considered together, and form a consideration, in the absence of any controlling facts to the contrary, so that the collection of the paper cannot be regarded as a gratuitous favor. Bank of Utica v. Smeads, 20 Johns. 372, and 3 Cowen, 662; McKinster v. Bank of Utica, 9 Wend. 46; affirmed in Bank of Utica v. McKinster, 11 Wend. 473.

"The contract, then, becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case, the bank is held to agree to answer for any default in the performance of its contract; and, whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to perform a part of what it has contracted to do, becomes responsible to its customer. This general principle applies to all who contract to perform a service. It is illustrated by the decision of the Court of King's Bench, in Ellis v. Turner, 8 T. R. 531, where the owners of a vessel carried goods to be delivered at a certain place, but the vessel passed it by without delivering the goods, and the vessel was sunk and the goods were lost. In a suit against the owners for the value of the goods, based on the contract, it was contended for the defendants that they were not liable for the misconduct of the master of the vessel in carrying the goods beyond the place. But the plaintiff had judgment, Lord Kenyon saying that the defendants were answerable on their contract, although the misconduct was that of their servant, and adding: 'The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not

answerable for his misconduct in those things that do not respect his duty to them.'

"The distinction between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one, applicable to the present case. If the agency is an undertaking to do the business the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant under contractors or sub-agents, when defaults occur injurious to his interest.

"Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And, while the rule of law is thus general, the liability of the bank may be *varied by* consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for the good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. *On any other rule*, no principal contractor would be liable for the default of his own agent, where from the nature of the business, it was evident he must employ sub-agents. The distinction recurs, between the rule of merely personal representative agency and the responsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. *If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertak-*

ing is for the due use of all proper means to performance. the responsibility extends to all necessary and proper means to accomplish the object. by whomsoever used.

"We regard as the proper rule of law applicable to this case, that declared in Van Wart v. Woolley, 3 B. & C. 439, where the defendants, at Birmingham, received from the plaintiff a bill on London, to procure its acceptance. They forwarded it to their London banker, and acceptance was refused, but he did not protest it for non-acceptance or give notice of the refusal to accept. Chief Justice Abbott said: 'Upon this state of facts it is evident that the defendants (who cannot be distinguished from, but are answerable for, their London correspondent) have been guilty of a neglect of the duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is, therefore, entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect.' In that case there was a special pecuniary reward for the service. But, upon the principles we have stated, we are of opinion that, by the receipt by the defendant of the drafts in the present case for collection, it became, upon general principles of law, and independently of any evidence of usage, or of any express agreement to that effect, liable for a neglect of duty occurring in that collection, from the default of its correspondent in Newark.

"What was the duty of the defendant, and what neglect of duty was there? An agent receiving for collection, before maturity, a draft payable on a particular day after date, is held to due diligence in making presentment for acceptance, and, if chargeable with negligence therein, is liable to the owner for all damages he has sustained by such negligence. Allen v. Suydam, 20 Wend. 321; Walker v. Bank of the State of New York, 5 Seld. 582. The drawer or indorser of such a draft is, indeed, not discharged by the neglect of the holder to present it for acceptance before it becomes due. Bank of Washington v. Triplett, 1 Pet. 25, 35; Townsley v. Sumrall, 2 Pet. 170, 178. But if the draft is presented for acceptance and dishonored before it becomes due, *notice of such dishonor must be given to the drawer or indorser, or he will be discharged.* 3 Kent's Com. 82; Bank of Washington v. Triplett, 1 Pet. 25,

35; Allen v. Suydam, 20 Wend. 321; Walker v. Bank of the State of New York, 5 Seld. 582; Goodall v. Dolley, 1 T. R. 712; Bayley on Bills (2d Am. ed.), 213.

"Moreover, the owner of a draft payable on a day certain, though not bound to present it for acceptance in order to hold the drawer and indorser, has an interest in having it presented for acceptance without delay, for it is only by accepting it that the drawee becomes bound to pay it, and on the dishonor of the draft by non-acceptance, and due protest and notice, the owner has a right of action at once against the drawer and indorser, without waiting for the maturity of the draft; and his agent to collect the draft is bound to do what a prudent principal would do. 3 Kent's Com. 94; Robinson v. Ames, 20 Johns. 146; Lenox v. Cook, 8 Mass. 460; Ballingalls v. Gloster, 3 East. 481; Whitehead v. Walker, 9 M. & W. 506; Walker v. Bank of the State of New York, 5 Seld. 582.

"In view of these considerations, it is well settled that there is a distinction between the owner of a draft and his agent, in that, though the owner is not bound to present a draft payable at a day certain for acceptance, before that day the agent employed to collect the draft must act with due diligence to have the draft accepted as well as paid, and has not the discretion and latitude of time given to the owner, and, for any unreasonable delay, is responsible for all damages sustained by the owner. 3 Kent's Com. 82; Chitty on Bills (13th Am. ed.), 272, 273."

Where a bank receives a collection with instructions, it must discharge its duties, follow the instructions, if reasonable, and exercise reasonable diligence and care. As to what is reasonable diligence, is a question of fact to be determined by the jury.[17]

Whre the draft is lost through negligence, the measure of damages *prima facie* is the amount of the bill.[18]

§ 271. Bank suing in its own name.

Rule. *The statute of the State, where suit is brought, controls. The general rule is, that if the indorsement upon the instrument is in blank, the bank can sue in its own name. The blank indorsement implies title to the instrument.*

17 National Bank *v.* City Bank, 103 U. S. 668.

18 Allen *v.* Suydam, 20 Wend. 319.

The rule is carried further in many of the States and it is held that the bank as an " indorsee for collection " may sue in its own name.

The States of California, Rhode Island, Oregon, Georgia, Nebraska, Missouri, Illinois, Tenessee, Florida, Michigan, and New York hold that a transfer of a note to a bank for collection gives it such an ownership thereof that it can sue the maker in its own name.

The States that have adopted the new negotiable instrument laws enlarge the rule and confer upon the bank receiving collections, the right to sue in its own name upon a restrictive indorsement.

Where a statute provides that an action shall be prosecuted in the name of the real party in interest, an agent cannot be for the purpose of collection, the real party in interest.

In the State of California, the code provides that every action must be prosecuted in the name of the real party in interest, except that an executor or administrator or trustee of an express trust or person expressly authorized by statute, may sue without joining with him, the persons for whose benefit the action is prosecuted.

A real party in interest is defined by the court, in the case of Giselman v. Starr, 106 Cal. 651, as follows:

The court says:

" But where the plaintiff shows such a title as that a judgment upon it satisfied by defendant, will protect him from future annoyance or loss; and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest."

In the case of Lanier v. Nash, 121 U. S. 404, it is held that a bank holding a note and mortgage as *trustee for collection* for another, may sue to foreclose in its own name.

For a leading case denying the right of a bank to sue in its own name, see First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville, 56 Fed. Rep. 967.

The court says, in discussing the question that the authorities are decidedly in favor of the law as given, but under special circumstances as where delay to bring suit (the collecting bank being the indorsee) would operate to discharge a surety, and there was not time to wait for advises from the owner of the paper, it would be the duty of the collecting bank to bring suit.

§ 272. When bank may renounce its authority to collect.

A bank is not permitted to renounce its authority or refuse to make a collection after the collection has been received and accepted by it from the owner.

The bank must take all the steps necessary and imposed upon it by law to enforce the collection.

A draft, however, which has been by the collecting bank, presented for acceptance after dishonor, may be returned to the owner within a reasonable time, and the act will be considered and construed as a renunciation of authority and the bank will be relieved of liability. But the return of the instrument must be done promptly.

The retention of a dishonored draft for any length of time, which, during the time, if in the hands of the owner, collection could have been made, would make the bank liable for the loss sustained.

In the case of Paint Company v. National Bank, 4 Utah, 353, where:

"The defendant bank received from the plaintiff, for collection, a sight draft on B. & S., the draft was accepted and the plaintiff notified thereof; the defendant, without further notification or taking any steps to collect the draft, held it for forty-seven days and then returned it as uncollectible. During all this time B. & S. were known by defendant to be insolvent, but had property worth more than the amount of the draft which was covered by an invalid deed of trust.

"Two days after the return of the draft, B. & S. made an assignment for the benefit of creditors to L. The vice-president and a director of the defendant, preferring a debt due defendant; held, that defendant was guilty of such neglect of duty in respect to the draft as to render it liable for the amount thereof."

The rule fixing the liability, attaches to the bank when it receives the collection; if received and before any loss may occur to the owner, it may renounce its authority by an immediate return of the collection.

If, however, the bank receives the collection, and undertakes with its depositor to collect for him the collection, and, upon indorsement thereof by the owner, the bank gives him credit for the amount upon his pass-book, it cannot then arbitrarily return the draft but must use reasonable diligence to collect the same.

The credit and entry in the pass-book operates as a closing of the transaction and implies a contract upon the part of the bank to make the collection.[20]

§ 273. Duty of collecting bank — Care — Diligence.

The general rule is again stated that the bank in receiving a collection must use ordinary care and diligence toward its collection.

The diligence and care required depends largely upon the circumstances arising in each case.

A bank may contract against liability for negligence of its agents or correspondents, especially so if the agent or correspondent is known to and accepted by the owner of the collection. But this rule is not good where the bank selects a correspondent without the consent or knowledge of the owner that proves to be irresponsible and incompetent.

When the collecting bank assumes the responsibility, its duty is to employ responsible correspondents.[21]

The Supreme Court of the State of Illinois, in the case of Fay v. Strawn, 32 Ill. 295, has held that a bank has the right to stipulate against ordinary liabilities of collecting paper.

The opinion of the court is very interesting and instructive upon this question.

Opinion of the Court.

" It is insisted that the finding of the jury is clearly against the weight of the evidence, and that the court below erred in not granting a new trial. The witness, Fay, testified that appellants, when first applied to, positively refused to undertake

[20] Kirkham *v.* Bank of America, 165 N. Y. 132.

[21] Fay *v.* Strawn, 32 Ill. 295.

the collection of the draft. That when they were applied to a second time for the same purpose, they only agreed to send the draft forward, upon the condition that they were to incur no liability. That it was agreed it should be sent to Burch & Co., for presentation, and when paid to be sent to appellants by express. That the draft was thus sent with these instructions. This evidence stands uncontradicted by any other testimony in the record. It was, however, attempted to destroy its force by proving the usual course of business of this and other banks of Ottawa. And much stress was placed upon the fact that when collected, Burch & Co. placed the money to the credit of appellants.

"If a special agreement was entered into at the time, the usage of this or other banking-houses could not in the least affect the liability of appellants. *Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement. The parties have the right to stipulate against the ordinary liabilities of the business, and appellants did clearly provide by express agreement against any supposed liability growing out of their undertaking.* When the draft was sent forward by appellants to Burch & Co., in accordance with the agreement, they became the agents of appellee for the collection of the money. We are unable to see anything in the evidence that overcomes Fay's testimony.

"It appears from appellant's letter remitting the draft to Burch & Co., that they gave directions to collect and at once to send the money by express, as it had been agreed between appellants and appellee.

The clerk of Burch & Co. testified that when the money was collected it was by mistake passed to the credit of appellants and against their instructions. Nothing can be inferred against appellants from this act, done without their sanction or consent. And it will be remembered it was not by their agents, but those of the appellee.

It is also urged that appellants were guilty of negligence in sending the draft to an irresponsible banking-house for collection. The evidence shows that in Chicago, where Burch & Co. did business, their character for solvency was good. It, however, appears that Warner had suspicions of their solvency

and communicated them to appellants, but he states no facts, except that he had heard persons predict that Corning would break Burch in their litigation. It also appears that some depositors withdrew their funds previous to that time from Burch & Co.'s banking-house. But it does not appear that appellants were aware of the fact, nor that the withdrawal was occasioned by want of confidence in the solvency of Burch & Co. The appellants transacted their business through this banking-house and seem to have had confidence in its solvency. This evidence is not sufficient to establish the liability of the appellants.

"It was lastly urged that appellants were guilty of negligence in taking no steps to correct the mistake in passing the money to their credit. It does not appear that they had any notice of the mistake until they heard of the failure. But it is insisted that when the money failed to come by express, they should have written to have learned the reason, and that had they done so the money might have been saved. The draft was received by Burch & Co. on the 30th of May, and it was paid on the next day. On the 3d of June, three days afterward, Burch & Co. failed and made an assignment. There were, then, but two days between the collection and the failure, within which to receive the money. Suppose appellants had become apprehensive that something was wrong, by failing to receive the money by express on the 1st of June and had written on the second, does any one suppose the money could have been thus obtained, or information that would have led to its receipt? It will hardly be contended that because the money was not received on the 1st of June, appellants should have gone in person or sent a messenger the next day; and even if they had, it is not probable anything could have been obtained.

"We think the verdict is clearly against the evidence and that the court below erred in refusing to set it aside. The judgment is, therefore, reversed, and the cause remanded.

Judgment reversed."

§ 274. Duty to present — Collection.

When the bank receives a collection, when presentment is necessary, it becomes the duty of the bank at the proper time

in order to charge the drawer and indorsers to present the same for acceptance or payment as the case may be. The absence of special instructions (which instructions if contrary to law) will not relieve it of liability.

The act of presentment is performed by exhibiting the paper and requesting its acceptance or payment; and when presented, the person presenting the same must be in possession of the instrument.

The reason for and requirement of an exhibit of the instrument is that the maker may judge of the genuineness of the same, and if paid, he may receive immediate possession of the bill.

If the drawee refuses to accept the bill when presented or refuses to pay, the bill is dishonored.

Where a note is payable at a particular bank and at a specified time, it is dishonored if, at the time it became due and payable, the instrument was in the possession of the bank for collection.

In such a case, the bank is not liable for not making a formal presentment of the instrument.

§ 275. Presentment of checks.

The rule as stated in a previous chapter, in discussing the law of checks relating to presentment or payment is, that when a check comes into the possession of a bank for collection it should be presented for payment with all dispatch and diligence.

It must be presented within a reasonable time after its receipt for collection. And as to what constitutes a reasonable time, depends upon the circumstances of each case.[22]

The court, in the case of Montelius v. Charles, 76 Ill. 303, says:

" The general doctrine in each case must depend on its own peculiar facts and be judged accordingly."

Presentment should be made during usual and reasonable hours, with banks presentment at a bank should be during banking hours.

The Supreme Court of the State of Vermont says, that when a note is payable at a bank where its business is transacted

22 Loyd v. Osborn, 92 Wis. 93.

during certain specified hours of the day, the note may be presented during any of those hours, and it is the duty of the maker to provide for its payment whenever the presentment is made. If the note is not paid when presented, the holder is at liberty to treat it as dishonored, and it is sufficient to charge the indorser.

In New York where a promissory note was made payable at a bank, it appeared that, upon the day the note fell due, the *indorser* being ready to pay it, sent the maker to the bank during banking hours to see if the note was there and to ascertain the amount.

In this case the note was not presented for payment until an hour after the close of the customary banking hours, then the holder was admitted into the bank and found the cashier and demanded payment. Payment was refused on the ground that no funds had been left with the bank to pay. The court held that the demand was sufficient to charge the indorser.

§ 276. Protest — Bank's duty.

The collecting bank is bound to protest paper when protest is necessary to preserve the owner's recourse against the parties liable to him.

The Statute of a State provides how, where, and when protest must be made.

Protest may be waived upon a foreign bill of exchange by language or words on the face of the instrument, waiving protest.

§ 277. Bank accepting payment for collection.

A bank is authorized to receive money only. If it receives checks, drafts, or other evidences of debt by doing so it takes them at its own risk and will be held responsible in money to the owner of the collection.[23]

This rule that the bank is authorized to receive money only is denied by the Supreme Court of the State of Kentucky, in the case of the Citizens' Bank of Paris, Ky. v. Houston, 98 Ky. 139.

[23] Essex Co. Nat. Bank *v.* Bank of Montreal, 7 Biss. 193 Fed. Cas. Nos. 4532, 5359.

Judge Lewis delivered the opinion of the court:

"Joseph Houston, about September 22, 1891, delivered to, and Citizens' Bank of Paris, Kentucky, received for collection an order or check for $129, which one Griffith had drawn on the Cynthiana National Bank at Cynthiana, payable September 30, 1891, to his order. In proper time it was sent to the latter bank, but returned, duly protested for non-payment, of which fact written notice was immediately mailed to both appellee and Griffith.

"October 6, 1891, Griffith drew an order on the Bourbon Bank of Paris, for $131.66, being the amount of the original one and protest fees added, and payable to order of Brent, cashier of Citizens' Bank of Paris, which, upon representation that he had there deposited money to meet it, was accepted by the bank instead of the original, then canceled and given up. But payment of that check was likewise refused, although presented for that purpose to the Bourbon Bank of Paris, on the day it was given and other days.

"October 22, 1891, Griffith made a deed of assignment for the benefit of creditors generally, and March, 1893, Houston brought this action to recover of Citizens' Bank of Paris, amount of original check and interest, for which, under peremptory instruction of the court, the jury returned a verdict, followed by judgment now appealed from.

"The alleged cause of action is that defendant, without consent or knowledge of plaintiff, canceled and gave up that check and accepted in lieu of it a check from Griffith, the debtor, on another bank, made payable to the order of its own cashier.

"Up to that time defendant had performed its undertaking with due diligence and in good faith, and the original check was plainly worthless, for Griffith was, as seems to be conceded, insolvent. But, where strictly required to do or attempt to do more in an effort to collect the debt, it is plain defendant accepted the new and gave up the old check in good faith, and as the only then practicable or possible way of subserving the interest of plaintiff. And that it intended and could possibly profit by assuming ownership of the debt and becoming liable to Houston, therefor, is wholly unreasonable. We know of no rule of right that would, under such circumstances, make

an agent liable to his principal, for such was the relation of the parties throughout the transaction.

"It may be that when an agent acts without or beyond the line of his authority, and the principal incurs thereby an injury, he may be held liable; but here no injury was done to plaintiff by cancellation of one and acceptance in its place of another check, nor, according to the evidence, was the transaction either without implied authority of plaintiff or such as he would or could have reasonably objected to if present.

"The testimony of Griffith introduced by plaintiff, shows that after the check on National Bank of Cynthiana had been protested for non-payment, he, by letter, informed and promised plaintiff he would go to Paris and 'fix it up,' and that plaintiff after being notified of the protest and return of the check to the Citizens' Bank of Paris, remained away four or five days, making no effort to collect it himself, is convincing that he expected and intended defendant, as his agent, to attend to the matter of having Griffith fix it up.

"The fact of the new check being made payable to the cashier of defendant is no evidence of its intention to assume ownership of the check or become liable to plaintiff therefor, because, he being absent, it had to be drawn in that way in order to procure proper presentation and payment.

"It seems to us, as this record stands, defendant incurred no liability to plaintiff, and the jury ought to have been so instructed."

It is held that a collecting bank is not authorized to receive in payment for collection, a claim against itself; and in the case of Francis v. Evans, 69 Wis. 115, the court holds that a bank is not authorized to receive in payment for a collection, its own certificate of deposit, but certificates of deposit by universal custom between banks are treated as cash; and where a custom becomes universal, it is recognized by the courts as a law and the courts will take judicial notice of a universal custom.

In the State of Iowa (at least) the court has taken judicial notice of a custom prevailing where the banks have treated certificates of deposit as cash.

§ 278. Duty of bank to collect interest, when.

A bank cannot accept payment of a note not due and release the maker for interest for the unexpired time. It is bound by the terms set out in the collection, and a failure upon the part of the collecting bank to enforce the provisions of the note or other instrument left for collection, makes the bank liable.

Where a certificate of deposit is left with the bank for collection, which certificate is payable on demand but would have borne interest if the deposit had remained in the bank up to a certain time and no instructions were given to the bank as to the time of collection, the bank having accepted payment of the principal, it is held that it was not guilty of negligence nor any violation of agreement or instructions and that it was not liable for the interest.[24]

§ 279. Collecting bank's liability as indorser.

A bank receiving paper for collection which requires it, the initial bank, to transmit the collection to another or the collecting bank, should not make itself a general indorser.

A general indorser is one who warrants to all subsequent holders in due course, that the instrument is genuine, and that he has title to the paper, and that all prior parties had power to contract.

It is held, in the case of Ferguson v. Staples, 82 Me. 159, that the indorsement of a transfer of an over-due town order by the payee for value, raises a contract on his part that the order is genuine and is the legal promise of the town that it purports to be; and even after it has been adjudged void, may elect to sue the indorser upon his contract and recover on the order according to its tenor.

The meaning of an indorsement, as defined by the court of Minnesota, is, that an indorser of a promissory note engages unconditionally that it is in every respect genuine;— that it is the valid instrument it purports to be, and that the ostensible parties were competent.[25]

The bank should qualify its indorsement, using such language as would negative a general indorsement.

24 Ide, ex'rx, v. The Bremer Co. Bank, 73 Iowa, 58.

25 Crosby v. Wright, 70 Minn. 251.

It is also the duty of the bank receiving a collection, if it has specific instructions from the owner of the paper directing the initial bank in its course and duty, to transmit such instructions to its agent, the collecting bank.

In the case of Borup v. Mininger, 5 Minn. 417, the court held that it was the duty of the initial bank to convey the instructions received by it from the owner to its correspondent; and no custom could absolve the bank from this duty, as the fixing of the liability of the indorser was the very essence of the undertaking.

It is also held that the initial bank should notify its corresponding bank in a foreign State, of the laws governing protest.[26]

The above authority also holds that a failure to furnish the corresponding bank the law governing such protests in the place or State where the contract is made, and by reason thereof the corresponding or collecting bank fails to comply with such law, that the initial bank is liable.

In the States where the new negotiable instrument laws are in force, a bank receiving paper which has been indorsed restrictively for collection, it is held that it is liable as a general indorser if it subsequently indorses the paper without qualification.

This rule is in contravention to the rule adopted by the Federal Court.

The law as laid down by this court is given in the case of United States v. American Exchange National Bank, 70 Fed. Rep. 232. "This was an action by the United States against the American Exchange National Bank to recover the amount of a pension draft which defendant had collected, as collecting agent of another bank; it appearing that the name of the payee had been forged upon the draft after her death."

"*Opinion of the Court.* The pension draft in this case was paid to the defendant bank by the Sub-treasury, upon the forged indorsement of the payee's name after her death. The Bellaire Bank of Ohio had previously cashed the draft upon the forged indorsement, and thereupon indorsed it 'for collection' to the defendant bank at New York. The latter was the collecting correspondent of the Bellaire Bank as re-

26 Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215.

gards its funds in New York. The collection was made in good faith by the defendant bank and the proceeds remitted to the Bellaire Bank some months before the discovery of the forgery. The indorsement of the forged draft by the Bellaire Bank showed upon its face that the defendant was to act as collecting agent only. The defendant never had any property in the draft or its proceeds. The later authorities sustain the proposition that in any case where the collecting agent pays over the funds before any notice of irregularity or fraud, the remedy is against the principal alone. (Bank v. Armstrong, 148 U. S. 50; White v. Bank, 102 U. S. 658; Sweeny v. Easter, 1 Wall. 166; Wells, Fargo & Co. v. United States, 45 Fed. 337; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632.)

"In such cases the indorsement by the collecting agent, who has no proprietary interest, does not import any guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal, as stated upon the face of the draft; and as this relation is evident upon the draft itself, the payor cannot claim to have been misled by the indorsement of the agent, or any right to rely upon that indorsement as a guaranty of the genuineness of the payee's indorsement.

"In the case of Onondaga Co. Savings Bank, 12 C. C. A. 407, 64 Fed. 703, as I find upon examination of the record on appeal, no question like the present arose. The Onondaga Bank was in the same situation as the Bellaire Bank in the present case. It had cashed the forged draft and was collecting the money for its own benefit as owner of the draft. Its indorsement imported a guaranty of the prior signatures; and the defendant's remedy here is against the Bellaire Bank.

"The direction of a verdict for the defendant upon the undisputed facts was, I think, correct, and the motion for a new trial should be denied."

§ 280. When bank liable for fraud or mistakes.

Where a party places in the hands of a bank a draft for collection with instructions to hand the collection to an attorney, the bank failing to do so, and in the meantime the drawee became insolvent, the bank is liable for the loss.[27]

27 Finch *v.* Karste, 56 N. W. 123.

The measure of damages for such negligence is *prima facie* the amount of the paper with interest.[28]

A bank is liable for a careless mistake, for example: where a note is plainly dated and it mistakes the date and fails to give notice, protest and the like.

The Supreme Court of the State of Pennsylvania says:

"Certainly, when the bank accepts this note for collection, it became its duty to use reasonable care and skill in attending to it: yet herein it is chargeable with a remarkable blunder in treating the date 15th December as if it were the 5th. There can be no doubt that the 15th is there, for anybody can see it who looks, and the court could commit no error in saying that much. But the first figure was not so strongly marked as the other, and therefore the bank's officers *interpreted it out* rather than overlooked it, and thus made a mistake and had the note presented for payment ten days too soon, and not at the proper time, and thus discharged the endorser. This was clear carelessness; for, if there was any doubt about the date, the bank ought to have refused the collection of it, or to have got the holder to state what was the true date, or to have presented it on both days. To guess a meaning contrary to the expression, is not careful."

Where a bank holding a note for collection receives the amount necessary to pay the same from an agent of the maker, and by mistake gave up to him a similar note of another person and returned the first note to its owner, to whom the maker paid it on demand and immediately, though four days after the payment to the bank, upon examining the note in the agent's hands, discovering the mistake, returned it to the bank and demanded back his money. Held, that he was entitled to it, although the bank had in the meanwhile paid the amount to the owner of the other note, the maker of which was insolvent and discharged for want of demand.[29]

The question of mistake or more properly negligence is one of fact.

In the case of Baltimore & Ohio Railroad Co. v. Worthington, 21 Md. 275, the court says:

"An absence or want of such care as the law requires in

[28] Commercial Bank *v.* Red River Valley Nat. Bank, 79 N. W. 859.

[29] Andrews *v.* Suffolk Bank, 12 Gray (Mass.) 461.

the performance of any given undertaking, * * * is a fact the finding of which is for the jury."

The rule is that if there is no dispute as to the fact, the question of negligence is one of law.[30]

§ 281. **Liability of initial bank for default of its agents.**

As previously stated, a bank must use reasonable care in selecting and employing its correspondents, notaries and other agents to assist in or make collections for it.

Where a collection is received by a bank and it agrees to undertake the obligation, it frequently becomes necessary to employ another bank, notaries and agents to perform this duty and make the collection.

When the paper is payable at a distance, this duty arises.

The bank then transmits the collection to its regular correspondent, if it has one, at the place where the paper is payable, if not, it selects a bank and sends the collection with instructions, if special, how to proceed and what to do. The selection having been made, and the paper forwarded, the initial bank, according to the weight of authority, makes itself liable to the owner of the paper for any failure of its correspondent in the performance of its duty.

If the initial bank has no regular correspondent at the place where the collection is to be made, before employing an agent, its duty is to ascertain what bank or person at that place is responsible.

Negligence of the initial bank in this particular, makes the bank liable.

If a bank is employed which is insolvent, where at the time of the employment it was within the means of the initial bank to ascertain this fact, and it failed to do so, the collection being made by the insolvent bank and the proceeds afterwards lost, the initial bank is held liable.

The initial bank is also liable where it selects an unsuitable and particularly incompetent person to give notice to indorsers.

§ 282. **Who are suitable agents.**

The debtor cannot under any condition or circumstance, be regarded as a suitable agent to be entrusted with the collection

30 Selz v. Collins, 55 Mo. App. 55.

of an obligation owing by himself. Common sense teaches that such a person cannot and should not be employed; but very frequently this common sense rule is set aside and disregarded, and banks send a collection direct to the bank owing the debt requesting that it remit the amount.

If the debtor bank failed to do so and a loss occurs, this is gross negligence and the initial bank is liable.

In the case of German National Bank of Denver v. Burns, 12 Colo. 539, the court very pertinently asks this question: "How can the debtor be the proper agent of the creditor in the matter of collections of debt?"

The court continuing, says: "If the debtor is embarrassed, there is the temptation to delay, and, if wanting in integrity, there is the opportunity to destroy and deny the evidence of indebtedness."

The Supreme Court of Illinois presents the unreasonableness and negligence of such a practice in the following questions and language:

"Can it be said to be reasonable care in selecting an agent, to select one known to be interested against the principal? To place the principal entirely in the hands of his adversary?"

The court further says:

"Surely it could not be reasonable care and diligence in an agent holding for collection, a promissory note given by one individual to another individual to send the promissory note to the maker, trusting to him to make payment, delay it or destroy the evidence of indebtedness and repudiate the transaction as his conscience might permit."

It is a very common custom and a rule generally followed by banks to remit drafts and checks directly to the bank owing them, and request that the remitting bank be credited with the collection and that notice of such credit be immediately given.

This custom or rule is not uncommon, and as stated is most always practiced especially between corresponding banks; but this custom although daily practiced, does not excuse or relieve the initial bank from liability in case of loss.

It is not reasonable care in selecting an agent to collect a debt, to select the debtor himself.[31]

[31] The Drovers' Nat. Bank v. The Anglo-American Packing Co., 117 Ill. 100; Merchants' Nat. Bank of Philadelphia v. Goodman et al., 109 Penn. St. 422, 78 N. W. 980.

The court holds, in the case of Davis v. First National Bank of Fresno, 118 Cal. 600, that a bank where negligence is charged, should be permitted to show the usage of banks in regard to the collection of paper presented by persons; and, if in making the collection it follows the course usually taken by banks under similar circumstances, it cannot be held to have been negligent; and in an action against the initial bank to recover the value of the collection on account of its negligence in so sending it, evidence is admissible that the conduct of the bank was in accordance with the usage of banks when making collections of paper presented by persons who were unknown to them. But a usage which is in contravention of law cannot be shown or pleaded to excuse a party in the performance of a reasonable duty.

§ 283. Banks employing notaries — Conflict of authority as to liability.

A bank has the authority to employ notaries to make protests, give notice, and generally to receive collections for it; and if employed by the cashier, the employment is construed to be an employment by the bank.

The important question affecting the bank is the one of laches and defaults by the notary. Does the bank become liable to the owner of the collection for such defaults?

This question has received considerable attention and has been discussed by the courts of many States at considerable length.

The Supreme Court of the United States, in the case of Britton v. Niccolls, 104 U. S. 757, in discussing the question as to the duty and liability of banks as collecting agents, and their responsibility for the acts of the notary to whom the notes sent to them for collection are delivered for presentment, demand and protest, states the law to be as follows:

"It is enough here that the notary was not, in this matter, the agent of the bankers. He was a public officer whose duties were prescribed by law; and when the notes were placed in his hands in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty, he alone was

liable; the bankers were no more liable than they would have been for the unskillfulness of a lawyer of reputed ability and learning to whom they might have handed the notes for collection in the conduct of a suit brought upon them."

The rule is undoubtedly established by a great majority of the courts of the various States and the Federal Courts, to be that if the collecting bank uses reasonable care in the selection of a notary, it cannot be held liable for his acts or defaults.[32]

§ 284. Officers of bank acting as notary.

Another important question to the banker upon this subject is: Can the president of a bank or other officer, who is also a notary public, act for the bank; and if so, does his laches or defaults as notary relieve the bank of liability?

In the case of Wood River Bank v. First National Bank of Omaha, 36 Neb. 744, the court holds that where a note is received by the bank with instructions to protest if not paid, and the president of the bank who is a notary, receives the note, it having been delivered to him for protest, he, failing to give the notice, which failure thereby operates as a discharge of the indorser, the bank is liable. The contrary doctrine is presented in the case of May v. Jones, 88 Ga. 308, 311.

The court in its opinion says:

"The plaintiff's theory is that, as Jones, the notary public, was also an employee and agent of the bank, 'the action of defendant Jones in the matter, he acting under the authority of the defendant bank, is the action of said bank.' This is all the allegation touching the bank's liability. Although there is conflict in the cases, the prevailing and better holding seems to be that a bank is not liable for the negligence or misconduct of a notary employed by it to protest negotiable paper. The reason is that the notary is not a mere agent or servant of the bank, but is a public officer, sworn to discharge his duties properly. He is under a higher control than that of a private principal. He owes duties to the public, which must be the supreme law of his conduct. Consequently, when he acts in his official

32 First Nat. Bank of Manning v. German Bank of Carroll Co., 107 Iowa, 543; Bellemire v. Bank of United States, 4 Whart. (Pa.) 105; Britton v. Niccolls, 104 U. S. 766; Bank v. Butler, 41 Ohio St. 519; Isham v. Post, 141 N. Y. 100.

capacity, the bank no longer has control over him, and cannot direct how his duties shall be done. * * * That the notary is also an employee and agent of the bank does not alter the case. There is still a sharp dividing line between his duties as agent and his duties as a public officer. When his public service comes into play, his private service is for the time suspended."

The theory of this opinion is, that he is not a mere agent of the bank, but is a public officer, and while acting in this capacity he lays aside his private status, and that it is merged in his public office, he is not and cannot be performing the duties of his private office.

This logic and reasoning seems to be sound, but it is defective in this particular. The duties of his private office are not laid aside, they are not merged into those of the public office at any time. His position as the president of the bank and his office as notary public are positions which he may hold at the same time. If the bank of which he is president receives a note for collection and he, as a notary, assumes the authority or is directed to protest the note, if he acts and proceeds to protest the note (being president of the bank) he acts for the bank as its agent, and at the same time performs the acts required and defined of notaries by the law governing and prescribing their duties. If he neglects to serve the notice of protest within the time required, and the indorser is released, the bank could not deny that while acting as notary his position as president of the bank or agent, which is one and the same thing, had been suspended to allow him to act as notary.

He is holding the dual position as agent and officer of the bank and the office of notary public, and acts in both capacities or positions at the same time.

And the dual position and responsibility, if assumed, should not excuse the bank for a failure by its agent in the performance of his duty while acting for it as notary public.

Where a bank selects or appoints a notary to act for it for a specified time, and for it required a bond for the faithful discharge of his duties, and failing to give notice to an indorser of a note by which the indorser was discharged, the notary is

not, in such a case, an independent officer, but is the agent of the bank.[33]

The rule then may be laid down as follows: *that where a bank delivers a note to a notary for protest, etc., it will not be liable for the default of the latter; but where an officer of a bank is a notary public and fails to discharge his duty as such notary, he is held to be the agent of the bank and the bank will be liable for his negligence.*

§ 285. Initial bank's liability for default of its correspondent — Conflict of authorities.

The Supreme Court of the United States, in the case of The Exchange National Bank v. Third National Bank, 112 U. S. 276, with great care reviews the various cases of the States and finally lays down the general rule of law to be, *that the initial bank is liable for such damages as it had sustained by the negligence of its agent or collecting bank.*

The facts in the case and opinion of the court are given in full.

Statement of facts:

"The facts found were these, in substance: The drafts were drawn by Rogers & Burchfield, at Pittsburgh, to the order of J. D. Baldwin, and by him indorsed, on 'Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.,' and were discounted before acceptance, by the plaintiff, at Pittsburgh, for the drawers. They bore different dates, from June 8, 1875, to September 20, 1875, and were in all other respects similar except as to the sums payable, and in the following form:

'$1,042.75. Pittsburgh, June 8, 1875.

Four months after date, pay to the order of J. D. Baldwin ten hundred and forty-two 75/100 dollars, for account rendered, value received, and charge to account of

Rogers & Burchfield.

To Walter M. Conger,

Sec'y Newark Tea Tray Co., Newark, N. J.'

33 Gerhardt v. Boatman's Sav. Inst., 38 Mo. 60; Wood River Bank v. National Bank of Omaha, 36 Neb. 744.

"They were transmitted for collection at different times before maturity, by the plaintiff to the defendant, in letters describing them by their numbers and amounts, and by words 'Newark Tea Tray Co.' They were sent by the defendant to its correspondent, the First National Bank of Newark, enclosed in letters describing them generally in the same way, except that, in two of the letters they were described as drawn on 'W. M. Conger, Sec'y.' The drafts were received by the defendant, in New York, within a day or two of the time of discounting them. They were presented by the First National Bank of Newark, to Conger, for acceptance, who, except in one instance, accepted them by writing on the face these words: 'Accepted, payable at the Newark National Banking Co., Walter M. Conger.'

"When the acceptances were taken, the time of payment was so far distant, that there was sufficient time to communicate to the plaintiff the form of the acceptance, and for the plaintiff thereafter to give further instructions as to the form of acceptance. The Newark bank held the drafts for payment, but the plaintiff was not advised of the form of acceptance until, on the 13th and 19th of October, two of them were returned to it by the defendant. At that time the drawers and indorser were insolvent, but the drawers were in good credit when the drafts were discounted by the plaintiff. The drafts were duly protested for nonpayment, but none of them were paid. The Newark Tea Tray Company is a New Jersey corporation, doing business in that State, and Walter M. Conger is its secretary.

"The drafts were represented to the plaintiff by Burchfield, one of the drawers, who offered them for discount, to be 'the paper of the Newark Tea Tray Company,' drawn against shipments of iron by Rogers & Burchfield to that company, and were discounted as such by the plaintiff. He also represented that Walter M. Conger was the person who examined the shipments of iron and 'accepted the drafts,' and that they were drawn in this form for the convenience and accommodation of the company. On drafts of Rogers & Burchfield on the 'Newark Tea Tray Co.,' dated May 4, 1874, May 20, 1874, and June 30, 1874, discounted by the plaintiff, and transmitted for acceptance to the defendant, and by it sent to the same Newark bank, that bank took acceptances from Walter M. Conger indi-

vidually, without notice to the plaintiff; and Conger, during the time drafts sent by the plaintiff to the defendant, addressed to the 'Newark Tea Tray Co.' and to 'Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.,' informed the cashier of the Newark bank that he would not accept these drafts in his official capacity as secretary.

The judgment was in favor of the New York bank. The Pittsburgh bank sued out this writ of error to reverse it."

Opinion of the Court:

"Mr. Justice Blatchford delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

"The negligence alleged consisted in not obtaining acceptance of the drafts by the Tea Tray Company, or having them protested for non-acceptance by that company, or giving notice to the plaintiff of such non-acceptance, and in failing to give notice to the plaintiff that the company would not accept the drafts or that Conger would not accept them in his official capacity.

"The decision of the Circuit Court proceeded on the ground that, at most, the defendant erred in judgment as to the import of the address on the drafts; that it had no information to qualify or explain such import; that for it to regard the drafts as addressed to Conger in his individual capacity was not a culpable error, because it followed decisions to that effect made by courts of the highest standing in New Jersey and New York and elsewhere; that it exercised intelligent and cautious judgment on the information it had; and that the plaintiff knew who was the intended drawee, as understood between it and the drawers, and ought to have advised the defendant, but failed to do so. (4 Fed. Rep. 20.)

"The only question presented by the record is that of the sufficiency of the facts found to support the judgment.

"It is contended by the defendant, that its liability, in taking at New York for collection, these drafts on a drawee at Newark, extended merely to the exercise of due care in the selection of a competent agent at Newark, and to the transmission of the drafts to such agent, with proper instructions; and that the Newark bank was not its agent, but the agent of the plaintiff,

so that the defendant is not liable for the default of the Newark bank, due care having been used in selecting that bank. Such would be the result of the rule established in Massachusetts,[34] in Maryland,[34a] in Connecticut,[35] in Missouri,[36] in Illinois,[37] in Tennessee,[38] in Iowa,[39] in Wisconsin.[40]

"The authorities which support this rule rest on the proposition that, since what is to be done by a bank employed to collect a draft payable at another place, cannot be done by any of its ordinary officers or servants, but must be entrusted to a sub-agent, the risk of the neglect of the sub-agent is upon the party employing the bank, on the view that he has impliedly authorized the employment of the sub-agent; and that the incidental benefit which the bank may receive from collecting the draft, in the absence of an express or implied agreement for compensation, is not a sufficient consideration from which to legally infer a contract to warrant against loss from negligence of the sub-agent.

"The contrary doctrine that a bank receiving a draft or bill of exchange in one State for collection in another State from a drawee residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers or from that of its correspondent in the other State, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability, is established by decisions in New York, Allen v. Merchants' Bank, 22 Wend. 215; Bank of Orleans v. Smith, 3 Hill, 560; Montgomery County Bank v. Albany City Bank, 3 Selden, 459; Commercial Bank v. Union Bank, 1 Kernan (11 N. Y.) 203, 212; Ayrault v. Pacific Bank, 47 N. Y. 570; in New Jersey, Titus v. Mechanics National Bank, 6 Vroom. (35 N. J. L. 588); in Pennsylvania, Wingate v. Mechanics' Bank, 10 Pa. St. 104; in Ohio, Reeves v. State Bank, 8 Ohio St. 465; and in Indiana, Tyson v. State Bank, 6 Blackford, 225.

34 Fabens *v.* Mercantile Bank, 23 Pick. 330; Dorchester Bank *v.* New England Bank, 1 Cush. 177.

34a Jackson *v.* Union Bank, 6 Har. & Johns. 146.

35 Lawrence *v.* Stonington Bank, 6 Conn. 521; East Haddam Bank *v.* Scovill, 12 Conn. 303.

36 Daly *v.* Butchers' & Drovers' Bank, 56 Mo. 94.

37 Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 221.

38 Bank of Louisville *v.* First Nat. Bank, 8 Baxter, 101.

39 Guelich *v.* National State Bank, 56 Iowa, 434.

40 Stacy *v.* Dane Co. Bank, 12 Wis. 629.

"It has been so held in the second circuit, in Kent v. Dawson Bank, 13 Blatchford, 237; and the same view is supported by Taber v. Perrot, 2 Gall. (U. S.) 565, and by the English cases of Van Wart v. Woolley, 3 B. & C. 439; S. C., 5 D. & R. 374, and Mackersy v. Ramsays, 9 Cl. & Fin. 818. In the latter case, bankers in Edinburgh were employed to obtain payment of a bill drawn on Calcutta. They transmitted it to their correspondent in London, who forwarded it to a house in Calcutta, to whom it was paid, but, that house having failed, the bankers in Edinburgh, being sued, were, by the House of Lords, held liable for the money, on the ground that they, being agents to obtain payment of the bill, and payment having been made, their principal could not be called on to suffer any loss occasioned by the conduct of their sub-agents, between whom and himself no privity existed.

"The question under consideration was not presented in Bank of Washington v. Triplett, 1 Pet. 25; for although the defendant bank in that case was held to have contracted directly with the holder of the bill to collect it, the negligence alleged was the negligence of its own officers in the place where the bank was situated.

"In Hoover v. Wise, 91 U. S. 308, a claim against a debtor in Nebraska was placed by the creditor in the hands of a collecting agency in New York, with instructions to collect the debt, and with no other instructions. The agency transmitted the claim to an attorney-at-law in Nebraska. The attorney received the amount of the debt from the debtor in Nebraska in fraud of the bankrupt law, and paid it over to the agency, but the money did not reach the hands of the creditor. The assignee in bankruptcy having sued the creditor to recover the money, this court (three justices dissenting) held that the attorney in Nebraska was not the agent of the creditor, in such a sense that his knowledge that a fraud on the bankrupt law was being committed was chargeable to the creditor on the ground that, the collecting agency having undertaken the collection of the debt, and employed an attorney to do so, the attorney employed by it, and not by the creditor, was its agent and not the agent of the creditor; and the creditor was held not to be liable to the assignee in bankruptcy for the money. In the opinion of the court, it is said, that the case falls within the decisions in the

above-mentioned cases of Reeves v. State Bank, 8 Ohio St. 465; Mackersy v. Ramsays, 9 Cl. & Fin. 818; Montgomery County Bank v. Albany City Bank, 3 Selden, 459; Commercial Bank v. Union Bank, 1 Kernan, 203, and Allen v. Merchants' Bank, 22 Wend. 215; and it is said that those cases, the first three of which are stated at length, show 'that where a bank, as a collection agency, receives a note for the purposes of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agent and not the sub-agents of the owner of the note.' The court proceeds to say, that those authorities go far towards establishing the position, that the collecting agency was an independent contractor, and that the attorney it employed was its agent only, and not in such wise the agent of the defendant as to make the defendant responsible for the knowledge of the attorney in Nebraska.

"The court then cites, as a case in point, Bradstreet v. Everson, 72 Pa. St. 124, as holding that where a commercial agency at Pittsburgh received drafts to be collected at Memphis, and sent them to its agent at Memphis, who collected the money and failed to remit it, the agency at Pittsburgh was to be regarded as undertaking to collect, and not merely receiving the drafts for transmission to another for collection, and as being liable for the negligence of its agent at Memphis. It also cites, as to the same purport, Lewis v. Peck, 10 Ala. 142, and Cobb v. Becke, 6 Ad. & El. 930. It then says that these authorities fix the rule, before stated, on which the decision is rested. So far from there being anything in that case which goes to exonerate the defendant in the case at bar, its reasoning tends strongly to affirm the principle on which the defendant must be held liable. Indeed, its language supports the view that the Newark bank, in this case, would not be liable directly to the plaintiff.

"If that be so, and the defendant is not liable, the plaintiff is without remedy.

"The case of Britton v. Niccolls, 104 U. S. 757, is cited to show that the defendant is not liable. In that case, the defendants, bankers in Natchez, Mississippi, received from the plaintiff, a resident of Illinois, for collection, two promissory notes, dated at Natchez, but not stating any place of payment. They

were sent to the defendants through a banking house in Bloomington, Illinois, with instructions to collect them, if paid, and, if not, to protest them and give notice to the indorsers. The defendants placed the notes in the hands of a reputable notary in Natchez to make demand of payment and give notice to the indorsers. It was held that the defendants were not liable for negligence on the part of the notary, whereby the liability of a responsible indorser was released. The negligence consisted in not presenting the notes to the maker at maturity and demanding payment. The maker resided twelve or fifteen miles from Natchez and had no domicile or place of business in Natchez. No information as to his residence was given to the defendants with the notes, and the plaintiff was ignorant of it. All the instructions which the defendants gave to the notary were given on the several days the notes matured, when they handed the notes to the notary with instructions to demand payment, and, if they were not paid, to protest them and send notice of non-payment to the indorsers. The notary knew where the maker resided and that he had no place of business in Natchez; but he inquired for him at three public places in Natchez, and not finding him, protested the notes for non-payment, and gave notice to the indorsers. The defendants had inquired at Natchez as to the residence of the maker, but had not learned it and had sent notices to him through the post-office there, of the amount and date of maturity of the notes, a reasonable length of time in advance.

"On these facts it is apparent that the only question raised, was as to the liability of bankers in Natchez, in respect to a note sent to them for collection, dated at Natchez and not payable at any specified place there or elsewhere, for the negligence of a public notary there. The suit was not against the banking house in Bloomington, which was only the agent to transmit the notes to the defendants for collection. The opinion of the court states the question to be as to 'the liability of the collecting bankers, for the manner in which the notary to whom the notes are delivered for presentment and protest discharges his duty.'

"The court says:

"'The notes being dated at Natchez, the presumption of law, in the absence of other evidence on the subject, is, that that

was the place of residence of the maker, and that he contemplated making payment there. The duty of the bankers, as collecting agents, was, therefore, to make inquiry for his residence or place of business in that city, and, if he had either, to make there the presentment of the notes, but if he had neither, to use reasonable diligence to find him for that purpose.'

"The court then refers to the case of Allen v. Merchants' Bank, 22 Wend. 215, in the Court of Errors of New York, as declaring the doctrine that a bank receiving paper for collection is responsible 'for all subsequent agents employed in the collection of the paper,' and states that, though that decision has been followed in New York, and its doctrine has been adopted in Ohio, it has been generally rejected in the courts of other States.

"The case of Dorchester Bank v. New England Bank, 1 Cush. 177, is then cited, as holding that if a bank acts in good faith in selecting a suitable sub-agent at the place where the bill is payable, it is not liable for his neglect; and the opinion states that this doctrine has been followed in the Supreme Courts of Connecticut, Maryland, Illinois, Wisconsin and Mississippi. The court, however, does not adopt either of these views, or rest the decision of the case before it on the latter view. For it proceeds to say:

"'In the New York case, in the Court of Errors, it was conceded that the general liability of the collecting bank might be varied and limited by express agreement of the parties, or by implication arising from general usage; and, in some of the cases in other States, proof of such general usage of bankers in the employment of notaries was permitted, and a release thereby asserted from liability of the bank for any neglect by them.'

"The court then states that there was in the case no proof of any general usage of bankers at Natchez, as to the employment of notaries public in the presentment and protest of notes left with them for collection. But, as there was a statute of Mississippi, passed in 1833 authorizing notaries to protest promissory notes and requiring them to keep a record of their notarial acts in such cases, and making the record admissible in evidence in the courts, as if the notary were a witness, and, as the courts of that State had held, Tiernan v. Com-

mercial Bank, 7 How. (Miss.) 648; Agricultural Bank v. Commercial Bank, 7 Smedes & Marshall, 592; Bowling v. Arthur, 34 Mississippi, 41, under that statute, that it was a part of the duty of the notary, when protesting paper, to give all notices of dishonor required to charge the parties to it, and that a bank receiving commercial paper as an agent for collection, properly discharged its duty, in case of non-payment, by placing the paper in the hands of such notary, to be proceeded with in such manner as to charge the parties to it, and that the bank was not liable in such case, for the failure of the notary to perform his duty, the court says, that, 'judged by the law of Mississippi,' the defendants 'discharged their duty to the plaintiff when they delivered the notes received by them for collection to the notary public,' and adds: 'What more could they have done, as intelligent and honest collecting agents, desirous of performing all that was required of them by the law, ignorant as they were of the residence or place of business of the maker of the notes, and having unsuccessfully made diligent inquiry for them?'

"It further says: 'The notary was not, in this matter, the agent of the bankers. He was a public officer whose duties were prescribed by law; and when the notes were placed in his hands in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty, he alone was liable.'

"On these grounds the court held that the defendants were not guilty of negligence and were not liable for the negligence of the notary. The decision was not placed on any general rule of commercial law, but rested on the fact that the notary was a public officer with duties prescribed by statute, and has no application to the case at bar. No reference was made to the case of Hoover v. Wise, nor any suggestion that the views stated in the opinion in that case were doubted or dissented from. There is, in the case at bar, no negligence of a notary, or of a public officer, or of any person whose duties or functions are prescribed by statute; and the question of the liability of the defendant is to be determined on principles not involved in the actual decision in Britton v. Niccolls.

"The question involves a rule of law of general application. Whatever be the proper rule, it is one of commercial law. It concerns trade between different and distant places, and, in the absence of Statutory regulations or special contract or usage having the force of law, it is not to be determined according to the views or interests of any particular individuals, classes or localities, but according to those principles which will best promote the general welfare of the commercial community. Especially is this so when the question is presented to this tribunal, whose decisions are controlling in all cases in the Federal courts.

"The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark bank for collection. This distinction is manifest; and the question presented is, whether the Newark bank, first receiving these drafts for collection, is responsible for the loss or damage resulting from the default of its Newark agent. There is no statute or usage or special contract in this case to qualify or vary the obligation resulting from the deposit of the drafts with the New York bank for collection. On its receipt of the drafts, under these circumstances, an implied undertaking by it arose, to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder against previous parties to the paper. From the facts found, it is to be inferred that the New York bank took the drafts from the plaintiff as a customer in the usual course of business. There are eleven drafts in the case, running through a period of over three months, and the defendant had previously received from the plaintiff two other drafts, acceptances of which it had procured from Conger at Newark, through the Newark bank. The taking by a bank, from a customer, in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service. The general profits of the receiving bank from the business between the parties, and the accommodation to the customer, must all be considered together and form a consideration, in the absence of any controlling facts to the contrary, so that the collection of the paper cannot be regarded as a gratuitous favor. Smedes v. Bank of Utica, 20 Johns. 372, and 3 Cowen, 662; McKinster v. Bank of Utica, 9 Wend.

46; affirmed in Bank of Utica v. McKinster, 11 Wend. 473. The contract, then, becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case, the bank is held to agree to answer for any default in the performance of its contract; and, whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to perform a part of what it has contracted to do, becomes responsible to its customer. This general principle applies to all who contract to perform a service. It is illustrated by the decision of the Court of King's Bench, in Ellis v. Turner, 8 T. R. 531, where the owners of a vessel carried goods to be delivered at a certain place, but the vessel passed it by without delivering the goods, and the vessel was sunk and the goods were lost. In a suit against the owners for the value of the goods, based on the contract it was contended for the defendants that they were not liable for the misconduct of the master of the vessel in carrying the goods beyond the place. But the plaintiff had judgment, Lord Kenyon saying that the defendants were answerable on their contract, although the misconduct was that of their servant, and adding: 'The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them.'

"The distinction between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one, applicable to the present case. If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant under-contractors or sub-agents, when defaults occur injurious to his interest.

"Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a com-

petent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principal contractor would be liable for the default of his own agent, where from the nature of the business, it was evident he must employ sub-agents. The distinction recurs between the rule of merely personal representative agency and the responsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used.

"We regard as the proper rule of law applicable to this case, that declared in Van Wart v. Woolley, 3 B. & C. 439, where the defendants, at Birmingham, received from the plaintiff a bill on London, to procure its acceptance. They forwarded it to their London banker and acceptance was refused, but he did not protest it for non-acceptance or give notice of the refusal to accept. Chief Justice Abbott said:

"'Upon this state of facts it is evident that the defendants (who cannot be distinguished from, but are answerable for, their London correspondent) have been guilty of a neglect of

the duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is, therefore, entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect.'

"In that case there was a special pecuniary reward for the service. But, upon the principles we have stated, we are of opinion that, by the receipt by the defendant of the drafts in the present case for collection, it became, upon general principles of law, and independently of any evidence of usage, or of any express agreement to that effect, liable for a neglect of duty occurring in that collection from the default of its correspondent in Newark.

"What was the duty of the defendant, and what neglect of duty was there? An agent receiving for collection, before maturity, a draft payable on a particular day after date, is held to due diligence in making presentment for acceptance, and, if chargeable with negligence therein, is liable to the owner for all damages he has sustained by such negligence. Allen v. Suydam, 20 Wend. 321; Walker v. Bank of the State of New York, 5 Selden, 582. The drawer or indorser of such a draft is, indeed, not discharged by the neglect of the holder to present it for acceptance before it becomes due. Bank of Washington v. Triplett, 1 Pet. 25, 35; Townsley v. Sumrall, 2 Pet. 170, 178. But, if the draft is presented for acceptance and dishonored before it becomes due, notice of such dishonor must be given to the drawer or indorser, or he will be discharged. 3 Kent's Comm. 82; Bank of Washington v. Triplett, 1 Pet. 25, 35; Allen v. Suydam, 20 Wend. 321; Walker v. Bank of the State of New York, 5 Selden, 582; Goodall v. Dolley, 1 T. R. 712; Bayley on Bills, 2d Am. ed. 213. Moreover, the owner of a draft payable on a day certain, though not bound to present it for acceptance in order to hold the drawer and indorser, has an interest in having it presented for acceptance without delay, for it is only by accepting it that the drawee becomes bound to pay it, and, on the dishonor of the draft by non-acceptance, and due protest and notice, the owner has a right of action at once against the drawer and indorser, without waiting for the maturity of the draft; and his agent to collect the draft is bound to do

what a prudent principal would do. 3 Kent's Comm. 94; Robinson v. Ames, 20 Johns., 146; Lenox v. Cook, 8 Mass. 460; Ballingalls v. Gloster, 3 East, 481; Whitehead v. Walker, 9 M. & W. 506; Walker v. Bank of the State of New York, 5 Selden, 582.

"In view of these considerations, it is well settled that there is a distinction between the owner of a draft and his agent, in that though the owner is not bound to present a draft payable at a day certain, for acceptance, before that day, the agent employed to collect the draft must act with due diligence to have the draft accepted as well as paid, and has not the discretion and latitude of time given to the owner, and, for any unreasonable delay, is responsible for all damages sustained by the owner. 3 Kent's Comm. 82; Chitty on Bills, 13th Am. ed. 272, 273.

"The defendant being thus under an obligation to present the drafts for acceptance, and having, in fact, presented them, through the Newark bank to Conger, the secretary of the company, was found not to take the acceptances it did, but to treat the drafts as dishonored. The plaintiff was, at least, entitled to an acceptance in the terms of the address on the drafts. Walker v. Bank of the State of New York, 5 Selden, 582. The defendant had notice from the description of the drafts by the words 'Newark Tea Tray Co.,' in the letters sending them for collection, that the plaintiff regarded the drafts as drawn on the company; and the defendant recognized its knowledge of the fact that the drafts were drawn on the company, by describing them by the words 'Newark Tea Tray Co.,' in its letters to the Newark bank, in every instance but two. If, on the face of the drafts, the address was ambiguous, it was not for the defendant to determine the question, as against the plaintiff, by taking an acceptance which purported to be the acceptance of Conger individually, especially in view of the information it had by the words 'Newark Tea Tray Co.,' in the letters sending the drafts to it for collection.

"It appears that the drafts were discounted by the plaintiff as drafts on the company, and, if it could have had an acceptance in the terms of the address, it would, in a suit against the company, have been in a condition to show who was the real acceptor. But, with the information given to the Newark

bank by Conger, while that bank had in its hands for acceptance drafts drawn in the same form as those here in question, that he would not accept such drafts in his official capacity as secretary, the Newark bank chose to take acceptances individual in form. This was negligence, for which the defendant is liable to the plaintiff in damages, no notice of dishonor having been given. The defendant was bound to give such notice to the plaintiff. Walker v. Bank of the State of New York, 5 Selden, 582.

"The question as to whether the company would have been liable on the drafts, if they had been accepted in the terms of the address, is not one on the determination of which this suit depends; nor do we find it necessary to discuss the question as to whether, on the face of the drafts, the company or Conger individually is the drawee. The very existence of the ambiguity in the address, and of the question as to whether the company would be liable on an acceptance in the terms of the address, is a cogent reason why the defendant should not be allowed, without further communication with the holder, to do acts which may vary the rights of the holder, without responding in damages therefor. The risk is on the defendant and not on the plaintiff.

"It is, therefore, plain that the judgment must be reversed. But judgment cannot be now rendered for the plaintiff for damages. There must be a new trial. Although there is a special finding of facts, it does not cover the issue as to damages. No damages are found. The action is one for negligence, sounding in damages. Although the complaint alleges that the drawers and the indorser are discharged for want of notice of non-acceptance, and though it is found that the drawers were in good credit when the drafts were discounted, and that the drawers and indorser had become insolvent by the 13th and 19th of October, 1875, there is nothing in the finding of facts on which to base a judgment for any specific amount of damages. On the new trial, that question will be open, and we do not intend to intimate any opinion on the subject."

The States that sustain the rule that the initial bank is liable to the owner of the paper are given in the order hereinafter

set forth, with citations of cases rendered by the courts of the various States.

New York,[41] New Jersey, [42] Ohio,[43] Georgia,[44] Michigan,[45] Minnesota,[46] Montana.[47]

North Dakota. The statute fixes the liability in this State, but in the absence of such a statute, the court evidently sustains the rule.[48]

Colorado,[49] Texas,[50] Indiana.[51]

The general rule that the initial bank is liable for all defaults of its agents in many of the States is modified and is stated as follows: *the initial bank, if it selects as its agent one who is competent and worthy of trust, and transmits the paper to him, its duty is done, and the owner of the collection must look to the sub-agent for any default of which he is guilty.*

The States sustaining this rule are:

California. The rule in California is not stated with the same precision and accuracy of language, but in effect it is as follows: that the initial bank is bound to exercise reasonable care and diligence in the employment of its sub-agents; and, if in the employment and in making the collection the course usually taken by banks is followed, the initial bank is not negligent. The holding of the court substantially supports the rule stated.[52]

41 National Revere Bank v. National Bank of Republic, 172 N. Y. 102; Kirkham v. Bank of America, 165 N. Y. 132, 58 N. E. 753; Castle v. Corn Exchange Bank, 148 N. Y. 122, 42 N. E. 518; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849; Naser v. First Nat. Bank, 116 N. Y. 492; Commercial Bank of Penn. v. Union Bank of N. Y., 11 N. Y. 203; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215.

42 Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588.

43 Reeves v. State Bank, 8 Ohio St. 466.

44 Bailie v. Augusta Savings Bank, 95 Ga. 277, 21 S. E. 717.

45 Simpson v. Waldby, 63 Mich. 439, 30 N. W. 199.

46 Streissguth v. National German-American Bank, 43 Minn. 50.

47 Power v. First Nat. Bank of Ft. Benton, 6 Mont. 251.

48 Commercial Bank v. Red River Valley Nat. Bank, 8 N. Dak. 382, 79 N. W. 759.

49 German Nat. Bank of Denver v. Burns, 12 Colo. 539.

50 Schumacher v. Trent, 18 Tex. Civ. App. 17, 44 S. W. 460; State Nat. Bank of Ft. Worth v. Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. 716.

51 Tyson v. State Bank of Indiana, 6 Blackf. (Ind.) 225; American Express Co. v. Haire, 21 Ind. 4.

52 Davis, Respondent, v. First Nat. Bank of Fresno, 118 Cal. 600.

Connecticut,[53] Illinois,[54] Iowa,[55] Kansas,[56] Maryland,[57] Massachusetts,[58] Mississippi,[59] Missouri,[60] Nebraska,[61] Pennsylvania,[62] Tennessee,[63] Wisconsin,[64] North Carolina,[65] Kentucky.[66]

§ 286. Review of decisions.

In a review of the decisions, we find that the rule which is established in the State ofMassachusetts is, that when an initial bank transmits a collection with proper instructions to a reputable and proper agent where the collection is to be made, it has performed its duty, and is not responsible for the laches, defaults or negligence of the correspondent. This rule, as we have seen, is (with some unimportant variations in language) sustained and held to be the law in the States of California, Connecticut, Illinois, Iowa, Kansas, Maryland, Mississippi, Missouri, Nebraska, Pennsylvania, Tennessee, Wisconsin, Kentucky and North Carolina.

The general rule which may be said to be the New York rule is, as previously stated, that the initial bank is responsible for the negligence, laches and defaults of its correspondents.

This rule is confirmed as the law by the Supreme Court of the United States and by the following States: New York, New Jersey, Ohio, Georgia, Michigan, Minnesota, Montana, South Dakota, Colorado, Texas, Indiana and the Federal Courts discussing the question.

53 Bank *v.* Scovell, 12 Conn. 303; Lawrence *v.* Stonington Bank, 6 Conn. 521.

54 Fay *v.* Strain, 32 Ill. 295; Waterloo Mining Co. *v.* Kuenster, 158 Ill. 259, 41 N. E. 906; Drovers' Nat. Bank *v.* Anglo-American P. & P. Co., 117 Ill. 100; Anderson *v.* Alton Nat. Bank, 59 Ill. App. 587; Carlinville Nat. Bank *v.* Wilson, 78 Ill. App. 339, 58 N. E. 250.

55 Guelich *v.* National State Bank, 56 Ia. 434, 9 N. W. 328.

56 Linsbourg Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

57 Citizens' Bank *v.* Howell, 8 Md. 530.

58 Warren Bank *v.* Suffock, 10 Cush. (Mass.) 582; Fabins *v.* Mercantile Bank, 23 Pick. (Mass.) 330.

59 Louisville Third Nat. Bank *v.* Vicksburg Bank, 61 Miss. 112.

60 Daly *v.* Butchers' Bank, 56 Mo. 94.

61 Omaha First Nat. Bank *v.* Moline First Nat. Bank, 55 Neb. 303; First Nat. Bank of Pawnee City *v.* Sprague, 34 Neb. 318, 51 N. W. 846.

62 Hazlett *v.* Commercial Nat. Bank, 132 Penn. St. 118; Wingate *v.* Mechanics' Bank, 10 Penn. St. 104; Bradstreet *v.* Everson, 72 Penn. St. 124, 13 Am. Rep. 665.

63 Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 35 Am. Rep. 691; Givan *v.* Bank of Alexandria (Tenn. Ch. 1898), 52 S. W. 923.

64 Stacy *v.* Dane County Bank, 12 Wis. 629.

65 Planters & Farmers' Nat. Bank of Baltimore *v.* First Nat. Bank of Wilmington, 75 N. C. 534.

66 Farmers' Bank & Trust Co. *v.* Newland, 97 Ky. 464.

The Supreme Court of New York presents its reasons in support of the rule upon the ground "that a contract to do the business covers all the means employed."

The Supreme Court of the United States embodies its position in support of the principle and the rule in the following language. It says, "*that the distinction between the liabilities of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another, is a fundamental one.* * * * *If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant under-contractors or sub-agents when defaults occur injurious to his interest.* * * * *The nature of the contract is the test.*"

With this reasoning in view, a bank that receives a note for collection without entering into a special contract particularly, specifying that it will not be held responsible for the laches and defaults of its agents who may subsequently be engaged to act, is held responsible to the owner of the collection. Therefore, a bank desiring to limit its liability, located in a State where the courts uphold this rule, should, before undertaking to collect for the owner of the collection (if it desires to avoid liability as an agent), enter into a contract with the owner of the paper limiting its liability to place for collection, the paper into the hands of reputable and reliable sub-agents.

A special agreement entered into, will control the rights and liabilities of the parties.[67]

The Supreme Court of the State of Michigan, in the case of Simpson v. Waldby, 63 Mich., p. 451, says:

"If I leave an indorsed note against persons in my own town for collection, and consequent demand and protest, I know that some agent or employee of the bank will do the work or some part of it, and I do not inquire who will do it. I contract, however, with the bank that suitable agents will be employed, and hold it responsible for their acts. * * * *If they wish to avoid such responsibility, it is very easy for them*

[67] Exchange Nat. Bank of Pittsburgh *v.* Third Nat. Bank of New York, 112 U. S. 276.

to accept such business only upon a special agreement as to their duties and liabilities. Failing to do this, I think they must, in taking such bills and drafts, be responsible as other business men are, for the misconduct of their selected agents at home or abroad."

§ 287. When correspondent bank liable to initial bank.

Conceding the rule holding the collecting or initial bank liable to the holder of the collection for defaults of its agents, to be the law, the correspondent bank, must be held liable to the initial bank for its default or negligence.

The authorities supporting the general rule of the initial bank's liability apply here.[68]

The correspondent bank is liable to the initial bank for the negligence of the agents employed by it, and it is held in the case of National Pahquioque Bank v. First National Bank of Bethel, 36 Conn. 325, that where the cashier of the defendant bank received notes, drafts and checks for collection from the initial bank, that he had ostensibly power and that it was his duty to collect the same, or to protest and return them. Failing to do either, he made the bank liable to the initial bank for their amount.[69]

§ 288. Where paper total loss.

Where a draft or note is indorsed to a bank for collection by blank or general indorsement, and it undertakes to collect the same and employs an agent if the instrument is lost through negligence, by the agent of the initial bank, the owner may look to the initial bank; and the initial bank may look to its correspondent.

The measure of recovery, when there is a total loss, is the face value of the paper.

Where it appears that a note entrusted to an express company was lost through negligence, the injury is the same as if it had been converted.[70]

[68] Exchange Nat. Bank of Pittsburgh. *v.* Third Nat. Bank of New York. 112 U. S. 276; Simpson *v.* Waldby, 63 Misc. 439, 30 N. W. 199; Ayrault *v.* Pacific Bank. 47 N. Y. 570; Streissguth *v.* National German-American Bank, 43 Minn. 50; Titus *v.* Mechanics' Nat Bank, 35 N. J. Law, 588.

[69] Merchants' Bank of Baltimore *v.* Bank of Commerce use of Hoffman, 24 Md. 12, 52.

[70] American Express Co. *v.* Parsons, 44 Ill. 312; Omaha (Neb.) Nat. Bank *v.* Kiper (Neb.), 82 N. W. 102.

§ 289. Right of creditors to proceeds of collection.

The rights of a creditor of the owner of the collection to garnishee the proceeds, while yet remaining in the initial or collecting bank, depends upon the law or the statute of the State.

The general rule is, that when the collection is in the hands of the initial bank as the property of the owner of the collection, and such facts can be established, it is subject to garnishment or attachment.

In the State of Georgia, the rule is laid down as follows: "where the payee of a bill of exchange by indorsing it 'for deposit to the credit of' himself, he retains ownership not only of the bill but of its proceeds until they are so disposed."

The collection of proceeds which under the rule as stated may be liable to garnishment or attachment; but, if the initial bank has allowed the owner to draw against the same while the collection is in the hands of a corespondent bank for collection, neither the bank itself or the proceeds would be liable to garnishment in the hands of the corespondent, for the reason that the initial bank has acquired a title thereto by allowing the indorser to draw against the same.

§ 290. Insolvency of initial or corresponding bank affecting proceeds of collection.

If the initial bank becomes insolvent while holding the proceeds of a collection, the owner of the collection is either a general or special depositor. If the funds have been passed to his credit after collection by his instructions, he becomes a general creditor of the bank.

If the proceeds of the collection are not passed to his credit under instruction, and the bank becomes insolvent while holding such funds, they become a special deposit or trust funds and the bank or its assignee or receiver must pay the claim in full.

If the collecting bank becomes insolvent while holding the proceeds of the collection, the owner of the collection in the States which hold the initial bank liable to the owner, is not affected by the insolvency of the corresponding bank. He may look to the initial bank.

The rule as laid down by the Supreme Court of the State of Kentucky, is as follows:

"When a bank receives a draft or note for *collection on account* or which is the same *collection and credit,* it does not owe the amount until collected; and though credit be given therefor prior to collection, the bank is not precluded from cancelling such credit which is regarded as only provisional, if the paper is dishonored. On the other hand, the owner of the paper is at liberty to treat the bank as an agent until the proceeds are collected by the bank in money, and an entry of credit by the bank before it has actually received the money, will not bind the owner. Therefore, when the bank has entered the credit and then gone into the hands of a receiver before it has actually received the money from another bank to which it transmitted the paper for collection, the real owner may recover from the latter bank, the proceeds still in its hands. Neither the receiver nor the creditors of the bank which transmitted the paper for collection, have any right to the money. A mere usage between banks, whereby the collecting bank credits the transmitting bank with the amount collected instead of remitting, is not sufficient to deprive the real owner of his rights."

§ 291. Collection completed when.

A collection is not completed by the bank until the owner is paid in money.

The payment of negotiable paper can only be paid with money.

Where an agent is employed to make a collection, he cannot accept anything but money in payment. His principal, however, may authorize him to accept something else.

Where a bank holding notes for collection, without authority from the principal, accepted other notes of the maker, payable to the bank for the principal sum, and credited the bank's account of the payee therewith, surrendering the notes, and no credit was given the account of the payer of the notes as for borrowed money, and no cash passed, and the bankers absconded, and the owner of the surrendered notes brought suit against the maker, it is held that no payment had been made and the owner could recover.[71]

Where a correspondent bank informs the initial bank, that

[71] Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265.

a draft sent to it for collection has been paid by the drawee giving his check therefor, and the initial bank thereupon gives credit to the owner of the draft, it cannot afterward, upon failure of the correspondent bank to collect the check, cancel the credit.[72]

The Supreme Court of the State of Illinois, in the case of Ridgely Bank v. Patton and Hamilton, 109 Ill. 479, in discussing the question as to the right of a banker to apply money on deposit to the payment of a note payable at the bank, without the order of the depositor, says, "clearly a banker has no right to apply money on deposit to the payment of a note of the depositor payable at the bank, without the order of the depositor." [73]

Payment to the initial bank's correspondent, in the States holding the initial bank liable directly to the holder, is payment to the initial bank to which the holder may look.[74]

A case reported in 1842 by the Supreme Court of the State of New York, holds that where a bank at Troy received a note for collection, payable at Buffalo, which was sent to a bank of Orleans for collection whence it was transmitted to a bank in Buffalo, the cashier of the bank of Orleans, acting under the mistaken supposition that the money due on the note had been collected and deposited to the credit of his bank, paid the amount to the bank at Troy, which bank paid it over to the holder; the bank of Orleans having parted with the money under a plain mistake of fact, held, that it might maintain an action for it directly against the holder.

§ 292. Bank's liability for negligence in failing to make collections.

The general rule is, that an action against a bank for negligence in failing to collect an instrument sent to it for collection, the burden of proof rests on the plaintiff to show that the drawee was solvent, and the draft collectible; and that the loss was due to negligence. Where a bank holds a draft according to its custom or the customary method of business for ten days without notice to the drawer, and during which time the drawee

72 Kirkham v. Bank of America, 165 N. Y. 132, 58 N. E. 753.

73 41 Ill. 267.

74 Reeves, Stephens & Co. v. State Bank of Ohio, 8 Onio St. 466.

makes an assignment, held, that it does not in itself, constitute such negligence as will make the bank liable to the drawer.[75]

Such a custom would not excuse the bank from liability, where it became necessary to bind an indorser or other party to the instrument, notice in such case is essential and must be given in a fixed time.

Negligence must result in loss to the owner of the paper.[76]

[75] Sahlien et al. *v.* Bank of Lonoke, 16 S. W. 373.

[76] Finch et al. *v.* Karste et al. 56 N. W. 123.

CHAPTER XXXIX.

SAVINGS BANKS.

§ 293. General discussion — Nature.

Savings banks were originally mutual in principle, eleemosynary in character. They were organized for the purpose of stimulating and fixing the habit of saving with the poor. They acted as fiduciary agents, only for those whose limited means or incompetency in some direction forbade the making of their own investments.

Only clerical services were compensated by salaries. The legislative functions and the power of making investments were lodged in a board of trustees. The members often lacking financial knowledge and experience serving without pay, the services rendered being as usual where the public is the recipient, careless and perfunctory with the result, savings institutions came frequently to grief, involving considerable partial losses to depositors.

In the course of time it was found that the scope of savings banks must be enlarged and that they must cease to be local, that deposits from a distance must be received, that investments must be sought away from home, and that provisions must be made for the receipt and caring for money of estates and of trust funds in considerable amounts. Then it was that the weakness of the old machinery became apparent and it dawned on the public that savings banks must be under the control and active supervision of those experienced in matters of finance, and who had a personal and pecuniary interest in the welfare of the institutions under their charge, beyond the question of mere employment and salaries. The result has been capitalized savings banks, particularly is this the case on the western coast of America.

Savings banks under the laws as previously stated are or may be of two classes, namely: Mutual associations or capital stock corporations. The mutual bank is organized without capital stock and for the sole purpose of accumulating, holding, and loaning the funds of their members. They are designated as institutions for the deposit and safe keeping of money, and the

profits, if any, arising from the investment of such deposits, are annually or semi-annually paid to the depositors.

Where the statute authorizes the incorporation of such savings banks (without capital stock) neither by terms or implication will the law permit the bank to conduct any other than a savings bank business. No corporation can, by law, engage in any business other than that expressly authorized by the law and its charter. The purpose of this provision of the law is obvious. If it is a mutual savings bank it cannot derive power by implication or otherwise to enter into or engage in any business except wholly in the interest of its members. And the statute when it imposes duties to be performed directing the class or kind of securities which it may hold or invest in is mandatory.

The limitations and powers when imposed upon the managers or officers of such institutions by the statute must be strictly complied with, and the officers in such cases acting for such associations become trustees.

The laws providing that the deposits may be loaned and invested (especially if it direct that they or a certain proportion of the same shall be invested in securities of a definite character) makes the managers or officers who direct and authorize such investments trustees, and as such they are held to the strictest account.

If the statute making these provisions is violated, the officers or trustees become personally responsible, and they should be held to suffer.

The statute directs the powers and limitations in the conduct and management of savings banks. The prohibitions and limitations fixed against the officers and directors of savings banks, forbidding them from borrowing any of the deposits or other funds of such corporation fully establishes the principle that they are acting as trustees, and it is a well-established principle of law that trustees cannot personally use, in any manner, either directly or indirectly, the funds of their principal, either for profit or otherwise. They cannot make profit from them. Therefore it is the duty of directors and trustees of such corporations to strictly comply with the law while they act in such positions and relationship with their depositors.

As stated, when a savings institution is incorporated without capital stock, they are merely places of deposit where money

can be left to remain or to be taken out at the pleasure of the owner, and under such terms as may be stipulated in the by-laws and agreed upon between the parties. In such a case the assets consist in loans of money made by them for the benefit of the members or depositors from whom the money was derived. In case of loss, they have no property out of which it can be paid, and the loss is apportioned *pro rata* among the depositors.

A mutual savings bank, having no stock, it receives the money of depositors for investment, and invests it in securities taken for the general benefit of all the depositors. When the bank is incorporated without capital stock, it becomes merely an incorporated agency, for receiving and loaning money on account of those to whom the money belongs. After the necessary expenses are paid for its management, the interest received upon the investments is to be ratably divided among the depositors. The trustees and officers, in the absence of fraud or peculation of the funds of such bank, have no personal liability.

A savings bank, incorporated for the sole purpose of receiving and investing the deposits and all the earnings of the bank other than those which go to the payment of the necessary expenses, belong to the depositors ratably.

Such is the nature of a mutual savings association.

Savings banks incorporated with capital stock are very different from the mutual association. In such a bank the stock of the corporation becomes a security to the depositors in case of loss. The trustees or directors in a corporation organized with capital stock are also held and bound by the same law in relation to the funds entrusted to them as are the trustees in a mutual association. And if the bank is organized with a *single purpose namely, to conduct a savings bank business,* having a capital stock does not give it power to conduct a commercial banking business.

Where the statute by special act provides for the incorporation of a capitalized savings bank, defining its duties and powers, it is confined in its operations and powers to the provisions of the law creating it. It cannot obtain through its charter greater powers than those authorized by the act or the law authorizing its creation and defining its privileges.

§ 294. State regulation of business.

Most of the States have enacted special laws authorizing the formation by incorporation of savings banks. Where such laws are enacted, they generally define the duties and powers of the corporation, prescribing how investments are to be made, and the class of securities which the associations may loan money on or hold.

Where the statute does not especially provide that a savings association shall have capital stock it may be incorporated without capital, and when incorporated in this manner, it is defined to be a mutual savings association.

Where the statute prescribes that no bank shall be incorporated within a State without capital stock, and fixes the amount of capital which it must have to entitle it to do business in certain cities and towns, composed of a certain number of inhabitants, a mutual savings bank or association without capital stock, under the provisions of such a statute cannot exist or be incorporated.

Such a law is one of prohibition, and its constitutionality may be questioned, upon the ground that no State has the right to prohibit (by imposing a capital to be used in business by) a person or any number of persons from forming themselves together for the purpose of conducting a lawful occupation or business, especially where the business to be conducted is mutual and confined to its members and purely for their benefit.

Can a mutual savings bank be denied the right to do business? A lawful calling cannot be prohibited. The general rule as laid down by Mr. Cooley in his work on constitutional limitations is, "That any person is at liberty to pursue any lawful calling and to do so in his own way, not encroaching upon the rights of others." [1]

A mutual savings association is not an institution organized for the purpose of profit to stockholders, or for the benefit of a certain number of their members, and is unlike savings banks organized with a capital stock. The purpose of a mutual savings society is to receive the money of its members for safe keeping, and return the same at such a time and in such a manner as all of the members may agree upon. If any profits

[1] Cooley's Const. Lim. (7th ed.) page 889.

are made by the investment of such funds they are to be divided among the members ratably.

Many of the States, however, have enacted laws which declare that such an institution cannot do business within the State unless it has a capital stock.

The effect of the law is to prevent any number of persons from placing into the hands of a board of trustees their property or money for safe keeping and investment.

In bank corporations which are organized purely for profit to their stockholders the deposits are not held strictly as trust funds, but when received the bank becomes a debtor for such funds. The capital stock of such a bank is then held as a security for the return of such deposits and for the faithful performance of the duties required by such corporations.

The Legislature is vested with the power to regulate and control and fix the amount of capital required of all corporations of a private nature. Especially those organized for profit, where the profits are obtained by the use of moneys of others, and where it is to be distributed to the stockholders. But a mutual savings society as previously stated is eleemosynary in its purpose and character, and is not possessed of power to do any business except for persons who become members.

But the right of the Legislature to regulate and fix the amount of capital required of banks of all classes is the accepted law.

§ 295. Depositors in mutual savings bank constitute the bank. In a mutual savings bank, that is, one which is entitled to exist, and has no capital stock, the depositors constitute the bank.

The Supreme Court of the State of New Hampshire, in the case of Cogswell v. Bank, 59 N. H. 43, says:

"The assets of savings banks consist of loans of money made by them for the benefit of their depositors, from whom the money was derived, and correspond to the capital stock in banks of discount, and depositors in savings banks stand in the same relation to the assets of the bank as stockholders to banks of discount. Bunnell v. Collinsville Bank, 38 Conn. 203; Simpson v. Savings Bank, 56 N. H. 466, 467; Osborne v. Byrne, 43 Conn. 155. They are the owners of the funds of the bank,

entitled to share in its profits and liable to bear its losses *pro rata*, and upon the winding up of the business of the bank each depositor is entitled to his share of the assets or property remaining after the payment of the debts. The depositors are in fact the bank, while the corporation is but an agency for receiving and loaning the money of the depositors. Coite v. Society for Savings, 32 Conn. 173. And the trustees and officers of the bank are the agents of the depositors. The claim of a savings bank depositor to his share of the earnings or deposits cannot be considered as a debt against the bank. Cushing, J. Simpson v. Bank, *supra*. Neither can such share be set off by a depositor against a debt due from him to the bank. Osborne v. Byrne, *supra*."

Mr. Justice Strong, associate justice of the Supreme Court of the United States, in defining a savings bank without capital stock and in determining the rights and relationship of the depositor to the bank, says:

"It is not a commercial partnership nor is it an artificial being, the members of which have property interests in it, nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depository for the money of those members of the community disposed to intrust their property to its keeping. It is somewhat of the nature of such corporations as church-wardens for the conservation of the goods of a parish, the college of surgeons, for the promotion of medical science or the society of antiquaries, for the advancement of the study of antiquity. Its purpose is a public advantage, without any interest in its members. * * * It is like many other savings institutions incorporated in England, and in this country during the last sixty years. Intended only for provident investment, in which the management and supervision are entirely out of the hands of the parties whose money is at stake, and which are *quasi*, benevolent and most useful, because they hold out no encouragement to speculative dealing or commercial trading. * * * Among the earliest savings banks are some in Massachusetts, organized under a general law passed in 1834, which provided that the income or profit of all deposits shall be divided among the depositors with just deduction of reasonable expenses. They exist also in New York, Pennsylvania, Maine, Connecticut and other States. Indeed until recently, the primary idea

of savings banks has been that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business inure wholly to the benefit of the depositors in dividends or in a reserve surplus for their greater security."

§ 296. Depositor has no liability in capitalized savings bank.

A depositor in a mutual savings society is declared as holding the same relationship as stockholders in a capitalized bank and may be held liable for their proportion of the losses if any exist at the time of winding up the affairs of the bank. While a depositor in a capitalized savings bank has no liability at any time.

§ 297. Nature of deposit in a capitalized savings bank.

A deposit in a savings bank may be general or special.

A general deposit in a savings bank is one which loses its identity and is intermingled with other deposits.

A special deposit is one which is kept separate and apart from other deposits.

A general deposit may be one designated as an ordinary deposit and paid as ordinary deposits to depositors in commercial banks without notice. A general deposit may also be a term deposit, where the depositor deposits his money with the bank agreeing not to withdraw the same without first having given the bank notice, which notice designates the time when the deposit is to be repaid.

A special deposit when received and allowed to be received by a savings bank, the bank in the care, safe keeping and return thereof, is governed by the same law of responsibility relating to and governing special deposits held by commercial banks.

§ 298. Trust deposit.

A trust deposit although entered on the pass-book as such, is not such unless intended to be.

One making a deposit in a savings bank which is declared in the book to be in trust for another, does not thereby create a trust if the depositor had not at the time the intention of doing so.[2]

[2] Cleveland *v.* Hampden Savings Bank, 182 Mass. 110; Cunningham *v.* Davenport, 147 N. Y. 43.

§ 299. Rules regulating and coverning depositors.

A savings bank may make such rules and regulations for receiving and for the withdrawal of deposits as are reasonable; and when understood by the depositor they are in the nature of a contract, and are binding upon both the bank and the depositor.

A rule printed in the pass book issued by the bank when properly made known to a depositor, receiving the same, and in which he has credit of a deposit made in the bank if lawful and reasonable is a part of the contract between him and the institution.[3]

§ 300. Gift — Savings bank deposit in trust.

"A gift, whether in the form of a trust, or otherwise, always involves the intention of the donor; and when the trial court has found that there was a gift which took the form of a deposit in a savings bank in trust for the donee, and the Appellate Division has unanimously decided that the findings of fact are supported by the evidence, the finding cannot be questioned in the Court of Appeals." [4]

§ 301. Amount of deposit received may be governed by statute.

The amount received on deposit, from any one individual or firm may be regulated by statute; but this privilege more properly belongs to the powers vested in the board of trustees or directors, and is made a rule by the adoption of a by-law to that effect.[5]

§ 302. When special deposit preferred.

When the by-laws of a mutual savings bank provide what classes of deposits may be received by the bank, specifying them: 1. As weekly deposits. 2. Special deposits and 3. Dime or regular deposits, one who makes a special deposit and receives a certificate in the words and figures following:

"OFFICE OF THE WASHINGTON COUNTY SAVINGS INS.
"HAGERSTOWN, *November* 20, 1873.

"Received from Tyron H. Edwards, one thousand and thirty dollars, on special deposit, to draw interest from July

[3] Israel *v.* Bowery Savings Bank, 9 Daly (N. Y.) 507; Eaves *v.* The People's Savings Bank, 27 Conn. 228.

[4] Farleigh *v.* Cadman, 159 N. Y. 169.

[5] Taylor *v.* Empire State Bank, 66 Hun (N. Y.) 538.

1, 1873, at the rate of three per cent. semi-annually, if not drawn out within one year."

It is held by the court in the case of Heironimus v. Sweeney, 55 Am. St. Rep. 333, to be a special deposit and as such becomes a debt of the bank, which must be paid before the other depositors.

The opinion of the court evidently is upon the theory that it was borrowed money, rather than a deposit, and as such became an obligation or debt and not a regular and ordinary deposit.

Where a depositor is entitled to preference and the bank is a mere trustee, a court of equity has jurisdiction.[6]

§ 303. Notice of withdrawal, when not required.

There are but few if any, savings banks that do not reserve the right by the enactment of a by-law of requiring depositors to give notice of their intention to withdraw their deposits. This requirement, or rule, may be waived by the bank as it generally is, except in times of a money stringency.

If the bank refuses to pay on the ground that the deposit has previously been paid to another, a notice to the bank is not required.[7]

§ 304. By-laws of savings banks.

The Franklin Savings Bank of Massachusetts, by a by-law, which was enacted by the bank, for its protection and entitled "Security Against Fraud" and which was as follows:

"As the officers of the institution may be unable to identify every depositor, the corporation will not be responsible for loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment. In all cases a payment upon presentment of a deposit book shall be a discharge to the corporation for the amount so paid."

The court in discussing this by-law and the liability of the bank says:

6 Commonwealth v. Bank of Pennsylvania, 3 Watts and Serg. 184.

7 Eaves v. People's Savings Bank, 27 Conn. 228, 71 Am. Dec. 59; Wall v. Prov. Savings Institute, 6 Allen (Mass.) 320; Heath v. Portsmouth Savings Bank, 88 Am. Dec. 194; People's Savings Bank v. Cupps, 91 Pa. St. 315.

"The plaintiff contends that the sole object of the by-law is to protect the bank against the risk of mistake as to the personal identity of its depositors, and therefore that it does not apply to a case where there has been no mistake as to identity, but the bank has paid upon a forged order purporting to be signed by the depositor. This argument would be very strong, perhaps conclusive, if this by-law had not contained the last clause. It would then have been the same, with only immaterial verbal changes, as the by-law considered in the case of Jochumsen v. Suffolk Savings Bank, 3 Allen, 87, cited by the plaintiff. But the added provision, that "in all cases a payment upon presentation of a deposit book shall be a discharge to the corporation for the amount so paid," enlarges the by-law, and extends its operation to other cases than those in which there is a mistake as to the identity of the depositor. Unless it has this effect, it is without force and useless. The bank is obliged to deal with a very large number of depositors, most of whom must be strangers to its officers. They are unable to identify the persons of the depositors, and it is equally impossible that they should know their handwriting. The danger of fraud, by payments upon forged orders accompanied by the book, may be as great as by payments to persons who falsely personate the depositor and present the book. In either case we think the purpose of the by-law was to authorize the bank to rely upon the presentation of the book as its security against fraud.

In the case at bar, therefore, a majority of the court is of opinion that if the bank, using reasonable care, in good faith, paid a whole or a part of the plaintiff's deposit upon the presentation of his book it is a case provided for by the by-law, and the corporation is discharged to the amount so paid." Levy v. Franklin Sav. Bank, 117 Mass. 448.

Another by-law which was enacted by the Bristol County Savings Bank of Massachusetts for the protection of the bank was as follows:

"As the officers of the institution will not be responsible for any loss sustained when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or part on presentation."

The validity and effect of the foregoing by-law is discussed

in the case of Goldrick v. Bristol County Sav. Bank, 123 Mass. 320. This is an important and valuable case, for the reason that the plaintiff, who was the depositor could not write his name, and was accustomed to make his mark, in the form of a cross. His book was stolen and a large portion of the deposits were withdrawn from the bank by one impersonating the plaintiff and owner of the deposit. The court, in this case, held that the bank was not liable as it had used reasonable care and the plaintiff and owner of the book failed to give the bank notice that the book had been stolen.

The bank-book contained a copy of the by-laws.

The facts in this case are interesting and the opinion of the court of sufficient importance to justify the giving of it in full:

"One of the by-laws of the defendant bank provides that 'as the officers of the institution may be unable to identify every depositor the institution will not be responsible for any loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or part, on presentation.' When the plaintiff made his deposits, he assented to the by-laws, and it thus became a part of the contract between the parties. The plain object of this by-law was to exonerate the bank from loss occasioned by the inability of its officers to identify the depositor, and to throw upon the depositor the risk of keeping his book safely.

The presiding judge who tried the case at bar without a jury was justified in finding, upon the evidence, that the bank in good faith and without negligence paid the amount which is sued for, upon presentation of the plaintiff's book, to some person who had stolen or otherwise obtained possession of it, and who fraudulently personated the plaintiff, no notice that the book was stolen having been given to the bank. This is exactly the case which the by-law was intended to provide for, and the plaintiff cannot recover without a violation of the terms of the contract which the bank made with him. Wall v. Provident Inst. for Sav., 3 Allen, 96; Levy v. Franklin Sav. Bank, 117 Mass. 448."

Another important case tried by the Supreme Court of Massachusetts is the case of Kimins v. Boston Five Cent Sav. Bank, 141 Mass. 33.

The facts in this case are stated as follows:

"The plaintiff was a depositor in the defendant bank and had one of its usual books of deposit. This book showed a deposit on May 24, 1875, one on May 24, 1880; two in 1881 and one on April 24, 1882, also various payments, the first being on May 4, 1880, and the last in 1883. All these payments were made on forged orders, purporting to be signed by the plaintiff, by her mark, and witnessed directing the bank to pay the respective amounts to a certain person who was the nephew of the plaintiff. This nephew forged the orders. Payments were made to said nephew on his presenting the orders and the plaintiff's deposit-book, wherein was entered the amount paid in each case, in the usual way and the book was then returned to said nephew. In each case the book was stolen, or fraudulently obtained from the plaintiff by said nephew, he knowing the place where the same was kept, and taken each time to get money on from the bank. The several deposits as they appear in the book were made by the plaintiff herself; and after entry thereof she received the book back again. A deposit was made on March 7, 1881. At this time the plaintiff's deposit-book showed three payments on forged orders. The plaintiff could neither read nor write, but it did not appear that the defendant had any knowledge that the plaintiff could not read, except in so far as such knowledge is imputable from the fact that the plaintiff instead of signing her name made her mark. Plaintiff had no knowledge that any sum had been drawn on the forged orders until the whole had been drawn, unless such knowledge is imputable to her on the facts herein appearing. The bank had no knowledge that the orders were forged or the book had been stolen, or fraudulently taken from the plaintiff.

The bank when it paid the several amounts on the forged orders, paid the same in good faith, and used diligence in the premises.

The deposit-book presented to the plaintiff when she made her first deposit contained the by-laws as they existed upon May 24, 1875, the date of the first deposit, and the plaintiff duly subscribed at that time the rules and regulations of the bank (by making her mark, which was witnessed) in the following form:

"The subscribers whose signatures appear below, or the agents of such subscribers, agree to be governed and to abide by the regulations of this institution as expressed in the by-laws of the same."

Among the by-laws contained in the plaintiff's bank-book was one giving the defendant's trustees power 'to alter or amend these by-laws, as the officers of the institution may be unable to identify every depositor, transacting business at the bank, the institution will not be responsible for loss sustained where the depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment."

On September 13, 1875, this by-law was amended as follows:

"In all cases a payment upon presentation of a deposit-book shall be a discharge to the corporation for the amount so paid."

This by-law as amended, has been in force since that time. The amendment was duly made in accordance with the provisions in the by-laws for their amendment, *but the plaintiff had no actual knowledge of such change in the by-laws, unless such knowledge is imputable to her from the facts herein stated, or she is presumed to have such knowledge.*

The bank did not give the plaintiff a new book with the by-law as amended nor did it request the surrender of the old book, and the acceptance of a new book containing the by-laws as amended; and it is not the custom of the bank to give notice to depositors of change in the by-laws, or make any change in deposit-books in such cases; and her signature was not requested to the amended by-laws, and it is not the custom of the bank to make requests for signatures in such cases. *The payments on the forged orders were all made after the by-law was amended."*

The court, on rendering its opinion says:

"The only defense is, that the defendant bank was authorized to make the payments to the plaintiff's nephew on the forged orders and the presentation of the deposit-book. The authority, if it existed, must have been given by the plaintiff when she made the contract of deposit, or must have arisen from an estoppel worked by her subsequent conduct. The facts

stated do not show an estoppel, and the ruling of the court that the plaintiff could not recover must have been on the ground that the contract authorized the payments. By the contract, the plaintiff agreed to be governed by the by-laws of the bank, and the by-laws were contained in the deposit-book given to her.

"By the by-laws as they existed at the time the contract was signed by the plaintiff, the bank had no authority to make the payments. They authorized a payment to one who falsely personated the depositor in presenting the stolen book, Goldrick v. Bristol County Sav. Bank, 123 Mass. 320; but not to one who falsely claimed to act under authority from the depositor, Jochumsen v. Suffolk Sav. Bank, 3 Allen, 87; Levy v. Franklin Sav. Bank, 117 Mass. 448.

"The defendant does not dispute its liability, if the case is to be determined on the construction of the by-law in force when the contract was made, but it contends that the by-law of 1875 became incorporated into the contract between the parties, and a part of it. If this was so, it would have given the defendant authority to make the payments. Donlan v. Provident Inst. for Sav., 127 Mass. 183.

"No notice was given to the plaintiff of this by-law, and she had no knowledge of it, and the deposits made after it was passed must be taken to have been made under the original contract.

"The defendant contends that the subsequent by-law became part of the contract of deposit, by force of the Gen. Stats., chap. 57, § 147 (Pub. Stats., chap. 116, § 29), which provided that the deposits might be withdrawn at such time and in such manner as the corporation in its by-laws directed, and of the by-law existing when the contract was made, which provided for making changes in the by-laws, with the plaintiff's agreement to abide by the regulations of the institution as expressed in its by-laws.

The authority of the defendant to make by-laws regulating the time and manner in which deposits might be withdrawn did not empower it to change, without the consent of the plaintiff, a contract it had made with her, nor to discharge the debt to her by payment to a stranger; nor was it any part of the

plaintiff's contract that the defendant might do this. See Donlan v. Provident Institution for Savings, *ubi supra.*

"The by-law in question is not one which merely concerns the regulations of the institution as to the time and manner of paying deposits to depositors. It materially affects the contract of deposit in the interest of the bank, and not of the depositor; and if it applies to contracts made before it was passed, it authorizes the bank to pay the money of depositors to those not authorized by the contract to receive it, and to relieve the bank from its obligation to pay it to the depositors. Authority to make such a material change in the contract, without the knowledge of the plaintiff, cannot be inferred from her agreement to abide by the regulations of the institution."

A still later Massachusetts case is Kingsley v. Whitman Savings Bank, 182 Mass. 252. The bank had adopted a by-law, which reads as follows: "As the officers of this institution may be unable to identify every depositor transacting business at the bank, the institution will not be responsible for loss sustained where the depositors have not given notice that their books have been stolen or lost, if the sums of money entered in such book shall have been paid in whole or in part on presentation of said book."

It was held in this case that the object of the by-law was to avoid loss from inability to identify the depositor, and that it did not prevent a depositor from recovering from the bank a deposit which had been paid by the bank to another person on presentation of the bank-book with a forged order.

The court in deciding this case reviews in brief the cases previously before the court, namely, the case of Jochumsen v. Suffolk Savings Bank, 3 Allen, 87; also, the case of Levy v. Franklyn Savings Bank, 117 Mass. 448; also, the case of Goldrick v. Bristol County Savings Bank, 123 Mass. 320; also, the case of Kimins v. Boston Five Cent Savings Bank, 141 Mass. 33, and the case of McCarthy v. Provident Institution for Saving, 159 Mass. 527.

Affirming the law, as previously presented by the courts, and re-states by quoting from the case in 117 Mass., the law to be as follows: "By the by-laws as they existed at the time the contract was signed by the plaintiff, the bank had no authority to make the payments. They authorized the payment to one

who falsely personated the depositor in presenting the stolen book; * * * but not to one who falsely claimed to act under authority from the depositor.

"We have no doubt that under our decision this is a correct statement of the law, and that on the facts of the case before us the by-law has no application."

The effect of a by-law is discussed by the Supreme Court of the State of Michigan in the case of Ackenhausen v. People's Savings Bank, 110 Mich. 175. In this case the bank had adopted the following by-laws:

"3. On making the first deposit the depositor shall sign his or her name in the signature book of the institution, which contains a copy of these rules and regulations, and to which the depositor will assent before his or her deposit can be received by this institution.

"7. Money deposited in this institution will be entered in a book which will be given to each depositor. This small book will be the depositor's voucher, or evidence of his or her deposit in the institution. When money is withdrawn, this book given to the depositor shall be brought into the bank to have the payments entered therein. Depositors can draw money themselves, or, in case of absence or sickness, it will be paid to their order, properly witnessed, and accompanied by the book.

"10. While the officers of this institution will do their utmost to prevent fraud, yet, as they will be unable to identify every depositor, this institution will not be responsible for loss sustained when a book has been mislaid, stolen, or lost, if, before the cashier is notified thereof, such book be paid in whole or in part on being presented.

"11. If a book be mislaid, stolen or lost, the owner is required to give immediate notice of the fact to the cashier of this institution."

There was also in force at the time of the adoption of the foregoing by-laws by the bank, the following statutory laws of the state, which reads as follows:

"All deposits in said bank shall be repaid to the depositors or his or her lawful representative when required, at such time or times, and with such interest and under such regulations as the board of directors of the bank from time to time pre-

scribes, which regulations shall be printed and conspicuously exposed in some place accessible and visible to all in the business office of said bank.

"A pass-book shall be issued to each depositor in the savings department, containing the rules and regulations adopted by the board of directors governing such deposits, in which book shall be entered each deposit made by, and each payment made to such depositors; and no payment or check against any such savings account shall be made unless accompanied by and entered in the pass-book issued therefor, except for good cause, and on assurances satisfactory to the officers of the bank."

The court says: "It is insisted that the bank complied with these provisions of the statute, and that plaintiff, because of his contract with the bank, has no cause of action against it" (the court citing the following cases): Schoenwald v. Bank, 57 N. Y. 418; Appleby v. Bank, 62 N. Y. 12; Sullivan v. Lewiston Institution, 56 Me. 507; Goldrick v. Bank, 123 Mass. 320.

The court then proceeding, says:

"The cases just cited undoubtedly hold that under the laws of this State, where the decisions were rendered and the by-laws in force, in those banks there was no liability; and if the savings banks, which were parties to the litigation involved in those cases, were created under like laws, and possessed with the same powers as savings banks possess in this State, the decisions would be conclusive."

The court then proceeds to discuss the nature of a mutual savings society and a savings bank capitalized and organized under the general laws of a State, and finally, in determining the law in this case and the effect of the by-law adopted by the bank, says:

"We think the requirement of the statute that the deposits shall be paid to the depositor or his legal representatives cannot be changed by a by-law, *unless the attention of the depositor is called to the by-law and he assents thereto, actually or impliedly.*"

As a conclusion upon this subject, it may be stated that the general rule laid down is as follows:

"The general rule is, that a by-law adopted by a savings bank to regulate its business, and for the repayment of its deposits, if

reasonable and not in violation of any statutory law, if known to the party dealing with the bank, is binding between them and as between the bank and the depositor, the by-law becomes a contract, unless the bank is negligent."[8]

It is clearly established that a depositor is not bound by a by-law in the beginning unless he knows of it.[9]

If the depositor cannot read he should get some one to read the rules to him, and it would seem to be the duty of the bank to aid him in this particular, and to know that the rules have been read to him.[10]

The rule is well established that if a by-law however reasonable and in all respects made in compliance with the law, will not relieve the bank of liability, if negligent.[11]

§ 305. Pass-books.

The pass-book issued to a depositor and in which entries of deposits are made, by the reciving teller of a savings bank, are original books of entry; and entitled to as much credit as evidence as the books retained by the bank.[12]

Where a figure in a pass-book is obscure and a disagreement arises between the bank and the owner of the book, as to the sum intended to be represented, the true meaning is a question of fact for the jury.[13]

A pass-book in New York is not negotiable and possession by a party other than the owner does not constitute proof of a right to draw money thereon.[14]

In Massachusetts a pass-book may be assigned. The delivery of the savings book with the intention of transferring

[8] Heath v. Portsmouth Savings Bank, 46 N. H. 78; 88 Am. Dec. Warhus v. Bowery Savings Bank, 21 N. H. 78; Mitchell v. Home Savings Bank, 38 Hun (N. Y.) 255. Israel v. Bowery Savings Bank, 9 Daly (N. Y.) 507.

[9] Ackenhausen v. People's Savings Bank, 110 Mich. 175; 68 N. W. 118; 64 Am. St. Rep. 338.

[10] Burrill v. Dollar Savings Bank, 92 Pa. St. 134, 37 Am. Rep. 669.

[11] Sullivan v. Lewiston Savings Inst., 56 Me. 507; 96 Am. Dec. 500; Donlan v. Provident Savings Inst., 127 Mass. 183, 34 Am. Rep. 358; Brown v. Merrimac River Savings Bank, 67 N. H. 549, 47 Am. Rep. 171; Kummel v. Germania Savings Bank, 127 N. Y. 488, 28 N. E. 398; Smith v. Brooklyn Sav. Bank, 101 N. Y. 58, 54 Am. Rep. 653; Wegner v. Second Ward Savings Bank, 76 Wis. 242, 44 N. W. 1096.

[12] Knox v. Savings Bank, 93 Mich. 511.

[13] Kux v. Savings Bank, 93 Mich 511.

[14] Kummel v. G. S. Bank, 127 N. Y. 488.

title to the money deposited transfers the equitable title to the deposit.[15]

§ 306. Savings banks borrowing money.

The power of a savings bank to borrow money may be determined by the terms of its charter and its mode of dealing. Where the relation between the bank and its depositors becomes one of debtor and creditor, a savings bank has the implied right to borrow money for the bank by negotiating or pledging any of its securities.

This proposition can only be sustained upon the theory that the bank becomes a debtor and is not that of trustee holding the deposits in trust for the depositors.[16]

In New Jersey where a savings bank was incorporated by a special charter, held that it had the implied power inherent in corporations created for business purposes, of borrowing money and of making negotiable paper or a pledge of its securities as a means of borrowing.[17]

§ 307. Investments.

Savings banks are required, usually by the statute of the State where incorporated, to invest or lend their deposits in a prescribed manner upon the security of land, bonds or stocks, the statute usually designating the kind of bonds or stocks which the bank may loan upon or invest in. In some of the States savings banks are vested by law with the power to discount and purchase paper. This is an attribute and a power belonging to commercial banks, but where the law of the State imposes no objection and the charter of the bank grants the authority, it may make discounts and purchase negotiable paper.[18]

A savings bank is prohibited from entering into a contract with a broker for the purchase and sale of stock for speculative purpose. Such contracts are *ultra vires*.[19]

15 Pierce *v*. Boston Five Cent Sav. Bank, 129 Mass. 425.

16 Ward *v*. Johnson, 5 Ill. App. 30.

17 Fifth Ward Sav. Bank *v*. First Nat. Bank, N. J. Law, 513.

18 Pape *v*. Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183; Duncan *v*. Maryland Sav. Inst., 10 Gill & J. (Md.) 299; United German Bank *v*. Katz, 57 Md. 128; Tishimingo Sav. Inst. *v*. Buchanan, 60 Miss. 496; Aull Sav. Bank *v*. Lexington, 74 Mo. 104; Rome Sav. Bank *v*. Kramer, 32 Hun (N. Y.), 270. *Contra*, Pratt *v*. Eaton, 79 N. Y. 449.

19 Jemison et al., *v*. C. S. Bank, 122 N. Y. 135.

Where the bank's charter prohibits loaning upon notes, bills of exchange, or other personal property, the loan is not void, only voidable.[20]

§ 308. Insolvency of savings banks — Appointment of a receiver.

Where a savings bank is declared to be insolvent a receiver may be appointed, unless the law of the State otherwise provides. The application may be made by the Attorney-General of the State where the law requires him to act.

In California it is the duty of the Attorney-General on a report made to him by all of the bank commissioners acting as a unit, declaring the insolvency of a bank, to immediately apply to the court for a receiver.

The application where the law does not require the Attorney-General to act may be made by a stockholder.[20a]

When equity courts are required to protect the interest of depositors, the assets of the bank should be reduced to cash as rapidly as possible without sacrifice and distributed among the depositors without delay.[21]

A receiver may not be appointed where the trustees by agreement with the depositors accept a stipulation of settlement and they proceed to act upon such stipulation and distribute the assets of the bank.[22]

§ 309. Rights of depositors.

When a savings bank becomes insolvent in some of the States, it is held that the depositors are general creditors like others.[23]

In New Jersey and some other States the depositors are not paid until after all the debts for management are discharged.[24]

§ 310. Depositor denied set-off.

The statute may provide otherwise, but the general rule is, that a general depositor in a savings bank, when insolvent and

20 Sistare v. Best, 88 N. Y. 527.

20a Gorman v. Guardian Sav. Bank, 4 Mo. App. 180.

21 Matter of Dime Sav. Inst. 29 N. J. Eq. 109.

22 Lewis v. Lynn Inst. for Savings, 148 Mass. 235.

23 Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Cogswell v. Rockingham Ten Cent Sav. Bank, 59 N. H. 43, 92 N. Y. 7.

24 Stockton v. Mechanics', etc., Sav. Bank, 32 N. J. Eq. 165.

in liquidation, is not entitled to set off his debt due the bank against the deposit due him, but must pay his debt to the bank and take his *pro rata* of the proceeds.[25]

The law is otherwise where the deposit is a special deposit. A special deposit made to be withdrawn upon call may be set off against the depositor's debt to the bank.[26]

A special deposit such as above referred to by the court is in fact a commercial deposit, and when accepted by a savings bank and allowed to be withdrawn upon call, the depositor does not receive interest or any portion of the dividends which may be declared by the bank, but in lieu thereof receives the privilege of drawing against his account with notice. Upon what principle of law or equity the right of *set-off* is allowed, the court fails to state. The court says that it "is a claim for money not deposited according to the charter of the bank nor in the ordinary course of business." The court proceeding, then says: "The charter of the bank gave it no power to receive and pay out money on call," and, therefore, because the bank officials had violated the charter of which probably the depositor had knowledge, it is held to be an equitable reason why such a special depositor should be entitled to the right of set-off.

It is again stated that a special deposit of money made by a person in a bank is one which the banker must keep separate and apart, and not mingle it with with the other deposits of the bank. Money which is deposited in a bank subject to call is not a special deposit, and a depositor in a savings bank receiving the privilege of checking against the same at any time without notice, in case of failure has no greater rights than any other depositor in the bank. If the bank has in fact received a special deposit and holds it in possession as such, it must return it to the depositor; a debt owing to the bank by such a depositor is entitled to a set-off.

The correct rule governing the right of depositors in purely mutual savings banks to set off their liabilities to the bank against the debt or deposit due them by the bank, is presented in the case of Stockton v. Mechanics', etc., Bank, 32 N. J. Eq. 163.

25 Sawyer *v.* Hoag, 17 Wall. (U. S.) 610.

26 Hall *v.* Paris, 59 N. H. 71.

"A savings bank under a special charter was authorized to receive and invest deposits for the benefit of the depositors, the income or profit to be divided among them, after reasonable deductions for necessary expenses, the principal to be repaid to the depositors at such times and with such interest and under such regulations as the board of managers should from time to time prescribe. Under their regulations they not only received deposits, participating in the profits, and not payable except on thirty days' notice, but also another kind of deposits (called by them "special deposits"), which were not to participate in the profits and were to be repaid (not redelivered) to the depositors, without any preliminary notice. Both kind of deposits were intermingled in the funds of the bank, undistinguishable. Under insolvent proceedings, a receiver was appointed. Held:

"(1) That such an institution is a mere trustee for the benefit of the depositors.

"(2) That a depositor who borrowed money from the bank, secured by his note or mortgage, cannot offset his debt against the amount of his deposit at the time when the decree of insolvency was made.

"(3) That the so-called 'special' depositors are not entitled to priority in payment over the other class of depositors.

"(4) That debts and expenses contracted by the bank in carrying on its ordinary business are to be preferred.

"(5) That a claim, under a covenant in the lease, for rent accruing after the surrender of the premises to the lessor by the receiver, cannot be maintained.

"(6) That money paid to the bank in exchange for its check, given for the accommodation of the payee, which was dishonored, presumably went into the funds, and the debt should be preferred.

"(7) That checks given to depositors on account of deposits, are not to be preferred."

If the depositor has deposited a special fund in the bank and has a contract with bank to the effect, that he may at any time set off his debt against his deposit, such a contract is lawful and the set-off, therefore, may be equitable, but the deposit must be retained by the bank as a special deposit, and a special

deposit must not be mingled with the general funds of the bank.

When a bank has been declared insolvent in a suit at the instance of the bank commissioners, brought by the Attorney-General, the directors may levy an assessment against the stock for a sufficient sum to pay the indebtedness.[27]

27 Union Sav. Bank of San José *v.* Leiter, 145 Cal. 696.

CHAPTER XL.

LIENS OF BANKS.

§ 311. General and special liens.

"A lien is defined to be a legal claim or charge upon real or personal property for a satisfaction of some debt or duty." Under the Code of California a banker has a general lien dependent on possession upon all property in his hands belonging to a customer for the balance due to him from such customer in the course of business. It is a well-established principle that a bank has a general lien on all of the moneys and funds which have been placed in the bank's possession and it may use the same and cancel any matured debt owing by the debtor to the bank.

The court, in Muench v. Bank, 11 Mo. App. 144, says: "The general lien of bankers is part of the law merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account, is undisputed. A banker's lien does not arise on securities deposited with him for a special purpose; otherwise, we have no doubt that when a discount has been made by the bank and the note is matured so as to create an indebtedness from the depositor of the bank, all funds of the depositor which the bank has at the date of the maturity of the discounted note, or which it afterward acquires in the course of business with him, may be applied to the discharge of his indebtedness to the bank, and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right and placed by him with the bank for collection."

A deposit of collateral security made to secure a particular debt, cannot be held by the bank after such indebtedness is paid and upon demand made by the owner must be returned to him. But a general deposit of collateral security made to secure any and all indebtedness that may be owing by the debtor, can be held until all the debtor's indebtedness is settled, and the lien of the bank can be enforced against said

property. But a bank has no lien upon the deposit of a customer for an indebtedness owing to it by him which has not matured, though he be insolvent.[1]

Stock certificates.

The Supreme Court of the United States in the case of Hammond v. Hastings, 134 U. S. 401, in discussing the law as enacted by the Legislature in the State of Michigan, section 4143, Howells' Annotated Statutes (1st ed.), section 17 of Act 187 (1875), which reads: "The stock of every such corporation shall be deemed personal property and be transferred only on the books of such corporation in such form and manner as their by-laws shall prescribe, *and such corporation shall, at all times, have a lien upon all of the stock*, the property of its members invested therein for all debts due from them to such corporation," says:

"The general act, Howells (1st ed.), § 4866, provides as to all corporations that a transfer of stock shall not be valid except as between the parties, unless entered on the books of the company showing the names of the parties by, and to whom transferred, the number and designation of shares and the date of the transfer. The bank was ignorant of 'Sweet's' indebtedness to the corporation when it lent its money on the security of the stock, and of course Hastings, though notified thereof at the time of the sale, succeeded to all of the rights of the bank. On these facts the circuit judge held that the purchaser took the stock discharged of any lien and submitted to the jury only the question of the value of the stock. This having been found by its verdict, judgment was entered therefor and the corporation now alleges error. *The single question is, whether the corporation had a lien upon the stock for Sweet's indebtedness as against the claims of the bank and the purchaser. This question must be answered in the affirmative, for the rule is clear and unquestioned that where by general law a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world.*"[2]

[1] Homer *v.* Nat. Bank of Commerce (Mo. Sup.), 41 S. W. 790; Gibbons *v.* Hecox, 105 Mich. 509, 63 N. W. 519.

[2] Union Bank *v.* Laird, 2 Wheat. 390; Brent v. Bank of Washington, 10 Pet. 596; National Bank *v.* Watsontown Bank, 105 U. S. 217, 221; Rogers *v.* Huntington Bank, 12 S. & R. (Pa.) 77; Sewall *v.* Lan-

The law under which this corporation (referring to the case of Hammond v. Hastings) was organized was a general law; so it has been decided by the Supreme Court of Michigan, in Newberry v. Detroit, etc., Co., 17 Mich. 141, 151, where it is said: "The law in question is a public act, and all are charged with knowledge of its provisions." This construction by the Supreme Court of the State of the law is conclusive in this court, as well as elsewhere, as to its character. The law in terms provides for a lien, and that being a public law, all are charged with knowledge of its provisions. Generally, wherever paper of a nature similar to this is issued under authority granted by general statute, whoever deals with that paper is charged with notice of all limitations and burdens attached to it by such statute. And this is true whether the party lives in or out of the State by which the law was enacted.

It is unnecessary to enter upon the certificate any statment of the limitations and burdens which the law casts upon all such paper, and the omission to state such limitations upon the face of the paper is not a waiver by the corporation of the benefits thereof.

The statute of the United States provides, section 5230, that: "For any deficiency in the proceeds of all of the bonds of an association (bank) to reimburse to the United States the amount expended in paying circulating notes of the association, the United States shall have *a permanent lien upon all of its assets, and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever*, except the necessary costs and expenses of administering the same."

The Supreme Court of the State of California, in the case of The Anglo Californian Bank (Limited), Appellant, v. Granger's Bank of California, Respondent, 63 Cal. 359, says: "The lien, if any, must have been created by the by-law above quoted, and it seems to us that no lien could be created in that way which would affect a *bona fide* purchaser for value without notice to whom the stock was transferred in mode prescribed by the Code. We think that the by-law, which it is

caster Bank, 17 S. & R. (Pa.) 285; Presbyterian Congregation *v.* Carlisle Bank, 5 Penn. St. 345, 348; Farmer's Bank *v.* Iglehart, 6 Gill. (Md.) 50; Reese *v.* Bank of Commerce, 14 Md. 271; Hartford Bank *v.* Hartford Ins. Co., 45 Conn. 22; Bishop *v.* Globe Co., 135 Mass. 132; Bohmer *v.* City Bank, 77 Va. 445.

claimed gives the defendant such a lien, is clearly inconsistent with the provisions of section 324 of the Civil Code which we have quoted. The provision that '*the transfer is not valid except between the parties thereto until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer.*' does not, as we consider it, justify the defendant in its refusal to enter upon its books the transfer from Fowler to the plaintiff any more than it would in the absence of any such by-law as the one upon which the defendant relies for its justification in this case. If there was a valid transfer of the stock from Fowler to the plaintiff, the latter had a right to have it transferred on the books of the defendant. The defendant might make by-laws regulating the transfer of stock, but it could not, under the power to regulate the transfer of stock, create a secret lien upon it, which would adhere to it in the hands of a *bona fide* purchaser for value and without notice."

This question was elaborately, if not exhaustively, discussed in Bullard v. Bank, 18 Wall. 589, and in Driscoll v. West Bradley & C. M. Co., 59 N. Y. 96, and the conclusion reached in both cases was that a corporation could not, under the power to make by-laws for the regulation of the transfer of stock, *create or declare a lien upon the stock by by-law, nor refuse to permit a transfer until the indebtedness of the stockholder to the company be paid.*

It is held that the bank's lien is not only effective against the debtor, but that the bank may pursue the property in the hands of his assignee for creditors, and may be enforced as against such assignee.

"Thus a bank to which paper was indorsed for collection before the maker thereof assigned for the benefit of creditors may set off the amount of the paper in a suit against it by the assignee to recover the maker's deposit in the bank." [3]

A commercial State bank can, by special agreement, unless prohibited by statute, have assigned to it as security its own stock, and it may purchase the same at a sale to protect the bank from loss. It may then sell the stock purchased at such

[3] Seloner on Bank Collections, p. 42; Penn. Bank v. Farmers' Deposit Nat. Bank, 130 Pa. St. 209.

sale and take the purchasers' note with the stock as collateral security.[4]

A national bank cannot, either by specific provisions or agreement entered into, take its own stock as security for a debt contracted by the stockholders with the bank, but as the law provides no penalty for its violation the proceeding can only be inquired into by the United States.

Rule between corespondent and initial bank.

The general rule is *that, as between the correspondent bank and the initial bank where there have been for several years mutual and extensive dealings between two banks and an account current kept between them in which they mutually credited each other with the proceeds of all negotiable paper transmitted for collection when received and accounts were regularly transmitted from the one to the other and settled upon these principles, and balances remitted when called for and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and the collecting bank had no notice that the transmitting bank did not own the paper, and such paper was transmitted by each of the two banks on its own account; held, there is a lien for a general balance of account no matter who may be the real owner of the paper.*[5]

But the general rule does not hold in the absence of a previous agreement or mutual dealings between the correspondent and the initial bank. The court says, in Millikin v. Shapleigh, 36 Mo. 596:

" * * * *But where there is no such mutual arrangement or previous course of dealing between the parties* whereby it is expressly or impliedly understood that such remittances of paper are to go to the credit of the previous account when received and no advance is made and no credit is given on the basis of the particular bill or on the faith of such course of dealing or such remittances, or where the special circumstances are inconsistent with the hypothesis of such mutual understanding, and the one bank merely bases the proceeds of paper

4 Union Nat. Bank *v.* Hunt, 7 Mo. App. 42.

5 Carroll *v.* Exchange Bank of Wheeling, 30 W. Va. 518, 4 S. E. 440. The President and Directors of the Metropolis, Plaintiff in Error, *v.* The President, Directors, etc., of the New England Bank, 6 How. 212.

remitted for collection to the credit of the other on a subsisting indebtedness which it happens at the time to have standing against the other, there is no such lien and no right to retain and apply the money collected in that manner, but the real owner of the funds may maintain an action to recover the amount."

In the case of the First National Bank of Clarion v. Gregg & Co., 79 Pa. St. 384, the rule as stated is as follows:

"A note was made to plaintiff's order, endorsed by him and sent through the house of Brady, a banker, for collection by him, endorsed to the defendant, a bank, for collection and credit. Held, that Brady by the endorsement did not become the owner of the note and had no right to pledge it, or direct its proceeds to be credited to him in payment of his indebtedness to the defendant."

Mr. Justice Williams, in delivering his opinion, says:

"Brady & Co. did not become the owners of the note by the plaintiff's endorsement and delivery of it to them for collection, and they had no right to pledge it or direct its proceeds to be placed to their credit in payment of their indebtedness to the bank. It is true that they were the apparent owners of the note, and in the absence of notice of the plaintiff's title the bank had the right to treat them as the real owners. If it had made advances or given new credits to Brady & Co., on the faith of the note, it would undoubtedly be entitled to retain the amount out of the proceeds, but just at this point the defense wholly fails. The affidavit of the cashier does not show that the bank made any advances or gave any new credits on the faith of the note, nor does it show that it incurred any liability or did anything by which its condition is worse than it could have been if it had not received the note for collection and credit, or that it will suffer any loss or damage if the credit is not allowed. If so, the bank has clearly no equity which entitles it to withhold the proceeds from the owners of the note."

In the case of Lawrence and Another v. The Stonington Bank, 6 Conn. 521, the court holds that:

"* * * a custom among banks of transmitting bills and notes from each to the other for collection, and when paid of passing the avails to the credit of the bank so transmitting

them, and to the debt of the bank so receiving them, cannot affect the claim of a third person to the avails of a bill which he has committed to one of them for collection."

The court in the above case, in discussing a banker's lien, says:

"In Jourdaine v. Lefevre *et al.*, 1 Esp. Rep. 66, it was said by Lord Kenyon that a banker had a lien on a note paid into his house and, of course, a right to retain it for his general balance. The doctrine more clearly appears from the case of Davis and Al. Bowsher, 5 Tenn. Rep. 488: 'A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect. This does not invalidate the banker's general lien upon all of the other bills in his hands, but he may retain them in order to secure the payment of his general balance.'"

A bank cannot acquire a lien against a specific or special deposit.[6]

A bank holding securities assigned to it by a partnership cannot in any event apply money belonging to one of them, to the satisfaction of a debt due by the other, without the consent of the former.[7]

The deposit of funds in the name of a person as trustee cannot be apportioned or applied by the bank to the payment of his individual indebtedness to the bank.[8]

In the case of Hodgins v. Bank, 124 N. C. 540, the rule as to the right of the bank to apply the deposits of a surviving partner to cancel the debts of the former is stated as follows:

"A bank has the right to apply the debt due by it for deposits to any indebtedness by the depositor in the same right to the bank, provided such indebtedness to the bank has matured."

6 Fitzgerald *v.* State Bank, 64 Minn. 469; Bank *v.* Ins. Co., 104 U. S. 54; Judy *v.* Farmers' and Traders' Bank, 81 Mo. 404.

7 Bank of Lagrange *v.* Calter, 101 Ga. 134; Dawson et al. *v.* Real Estate Bank, 5 Pike (Ark.), 283; Ferry *v.* Home Savings Bank, 114 Mich. 321.

8 Bundy *v.* Town of Monticello, 84 Ind. 119; National Bank *v.* Ins. Co., 104 U. S. 54; Clemer *v.* Drovers' Nat. Bank, 157 Ill. 206; Preston *v.* Prather, 137 U. S. 604.

CHAPTER XLI.

STATUTE OF LIMITATIONS.

§ 312. Runs against checks, when.

In the absence of a statute of a State declaring that the statute of limitations shall not run against money deposited in the bank, the rule is that the statute begins to run against the liability of the bank from the time a demand for payment is made.[1]

A delay to call for a deposit for a period of six years from the time the money was placed in the bank is not a bar to a right of action against the banker.[2]

Where a bank holds funds of a depositor subject to call, the contract is one to pay on demand, and the statute does not begin to run until demand.[3]

A certification of a check by the bank does not change the rule. The statute does not begin to run until after demand.

It is also claimed that the statute does not begin to run until demand is made by owner of bank stock for dividends.

§ 313. Runs against certificates of deposits, when.

A certificate of deposit is, by the courts, declared to be in legal effect a promissory note; and the statute of limitations, if such is the law, begins to run immediately, and no demand is necessary.

In the case of Mitchell v. Easton, 37 Minn. 335, the court says, in discussing the question of the statute of limitations in a suit brought upon an instrument designated as a certificate of deposit which is in the words and figures following:

"Mower County Bank, Austin, Minn., March 29, 1876.

"L. S. Mitchell, Esq., has deposited in this bank seven hundred fifty and no-100 dollars, payable to the order of himself, in current bank notes, on the return of this certificate properly indorsed, with interest at the rate of ten per cent. per annum.

"SMITH, WILKINS & EASTON."

1 39 Pa. St. 92.

2 Girard Bank *v.* Bank of Penn Township, 39 Pa. St. 92.

3 Starr *v.* Stiles, 19 Pac. Rep. 225.

"The defendants received the money of the plaintiff, and, by the instrument sued on, promised and agreed to repay it, with interest, and by placing their obligation in this form they manifest an intention to change the character of the transaction from that of an ordinary deposit to that of a debt or loan evidenced by an instrument construed to be a promissory note payable on demand. If the parties desired to place any other or further limitation upon the rights or obligations of either, it should have been expressed upon the face of the instrument.

"Upon the question under discussion it is admitted that the authorities differ. In New York the cases indicate much conflict of opinion. Some of them hold that such certificates are promissory notes; others mere receipts or written evidences of a deposit, and as such continuing securities, which, though negotiable, are not dishonored until after an actual demand. See National Bank of Fort Edward v. Washington County Bank, 5 Hun, 605. But if they are promissory notes payable on demand, then, under the statute above referred to, they would be dishonored after sixty days. But this could not consistently be the case if the paper was not due until an actual demand. But it is manifestly the better rule in practice to hold that such demands become stale and outlawed unless collected or sued within six years. Brummagin v. Tallant, 29 Cal. 503 (89 Am. Dec. 61); Tripp v. Curtenius, 36 Mich. 494; Curran v. Witter, 68 Wis. 16 (31 N. W. Rep. 705)."

The general rule is that a certificate of deposit, if a promissory note and payable on demand, is due immediately without any actual demand, and that the statute begins to run at once.[4]

The statute begins to run when a right of action accrues.[5]

Where the courts hold that a certificate of deposit is not in legal effect a promissory note, the certificate becomes due (unless a date is fixed) from the date of demand, and the statute does not begin to run until demand is made.

The Supreme Court of the State of Massachusetts, in the case of Shute v. Pacific Nat. Bank, 136 Mass. 487, holds that a certificate of deposit issued by a national bank is not a

4 Brummagin *v.* Tallant, 29 Cal. 503; Cousins *v.* Partridge, 79 Cal. 228; Story on Promissory Notes, § 29; Angell on Limitations, § 59; Wood on Limitations, § 124.

5 Jones *v.* Nicholl, 82 Cal. 32.

promissory note within the meaning of the General Statutes, chapter 53, section 10.

It is also held by the same authority, that a certificate of deposit is not due until a demand is made and the certificate returned or tendered.[6]

§ 314. Statute runs against stockholder's liability, when.

In a suit by a receiver of an insolvent national bank to collect an assessment authorized by the Comptroller of the Currency, upon the stock from a stockholder who has made a fraudulent transfer of his shares, is based upon the statutory liability of the stockholder, and the statute begins to run from the date the assessment becomes due.

The statute begins to run from the accrual of the liability.[7]

When a bank fails and its assets are insufficient to pay off all of its liabilities, the stockholders become liable for such deficiency to the extent provided (if a national bank by the statute of the United States, if a State bank by the statute of the State), and no limit of time being prescribed by the Federal Statutes within which an action must be brought to enforce an assessment against a stockholder, such an action is governed, as to limitation, by the statute of the United States.

But see Aldrich v. Skinner, 98 Fed. Rep. 345. The court here holds that the statute of the State where the action is brought governs.

In a very late case the Supreme Court of the United States has decided that the Statute of Limitations of a State is no defense to an action brought by the receiver of a failed national bank against its stockholders.

Chief Justice McKenna, in rendering the opinion of the court in the case of Rankin, Receiver of the Hutchinson National Bank v. Edward E. Bartin,— a stockholder, says:

"We think the Kansas Supreme Court overlooked the official character and power of the Comptroller of the Currency and the decisions of this court declaring them. A national bank is an instrumentality of the United States, its circulating notes

[6] Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377; Monger *v.* Albany City Bank, 85 N. Y. 580.

[7] Thompson *v.* German Ins. Co., 77 Fed. Rep. 258; Godfrey *v.* Terry, 97 U. S. 171.

are guaranteed by the United States, and if the United States should be compelled to pay them the United States has a paramount lien on the assets of the bank for reimbursement. The administration of the bank's assets is, therefore, vested in the Comptroller as an officer of the United States. He appoints the receiver and directs his acts. Individual liability of a stockholder can only be enforced by his order.

"As the power of the Comptroller is derived from a statute of the United States, it cannot be controlled or limited by State statutes."

§ 315. When State statute does not govern.

In actions for the recovery of usurious interest, a State statute limiting the time within which an action to recover excessive interest may be brought does not apply.[8]

In the State of California it is held in the case of Wells v. Black, that the Statute of Limitations commences to run against the liability of the stockholders of a savings bank from the time when the debt was created and the liability incurred upon the acceptance of each deposit, and at the expiration of three years thereafter, the right to enforce the stockholder's liability is at an end.

The court says:

"Since the relation of debtor and creditor existed between the bank and its depositors it follows that the debt was created and the liability incurred at the time of the acceptance of each deposit. At the expiration of three years the right to enforce the stockholder's liability was at an end. (Code Civ. Proc., § 359; Hunt v. Ward, 99 Cal. 612, 37 Am. St. Rep. 87; Bank v. Pacific Coast S. S. Co., 103 Cal. 594.) Whatever divergence of views may be found in the earlier adjudications, the cases above cited contain the last expressions of the court upon the question. It follows, therefore, that plaintiff's cause of action is barred as to all deposits made more than three years before the commencement of the action.

"The judgment is ordered modified to conform to these views, appellants to have their costs upon appeal."

8 Lucas v. Government Nat. Bank of Pottsville, 1 N. B. C. 872.

§ 316. **Fraudulent act by officer of bank — Statute runs when.** Where an officer of a bank has committed a fraudulent act causing loss or injury to the bank, which act is unknown to the directors of the bank, in an action brought against him (the officer) for money had and received, the Statute of Limitations does not begin to run until the knowledge of the act has been discovered by the directors.[9]

[9] Atlantic Nat. Bank *v.* Nathaniel Harris, 118 Mass. 147.

CHAPTER XLII.

FORFEITURE OF BANK'S FRANCHISE.

§ 317. Acts of banks which may forfeit charter.

The National Banking Act, section 5239, Revised Statutes of the United States, provides:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved."

§ 318. Acts constituting liability.

A franchise of a national bank is liable to forfeiture when the acts are committed by the directors knowingly, and the information brought must charge that the act was done by the directors, or that they knowingly permitted it to be done.[1]

If the action is not brought within a period of five years it is barred by the Statute of Limitations.[2]

By the provisions of the foregoing statute the Comptroller of the Currency is given discretionary power to bring the action. The authority is vested in him. No other person can complain or institute proceedings.

The statute in some of the States has enacted laws declaring that if a bank shall violate any of the laws of the State or its charter by doing acts in excess of its powers, or failing to comply with express provisions of the law directing it to perform certain acts, its charter may be forfeited in a suit instituted by the Attorney-General of the State.

The charter of a State corporation, whether obtained under

1 Trenholm, Comptroller of the Currency, v. Commercial Nat. Bank of Dubuque, 38 Fed. Rep. 323.

2 Welles v. Graves, 41 Fed. Rep. 459.

a special or general law, cannot be forfeited only by an action brought under the direction and authority of the Attorney-General of the State. A complaint may be laid by any individual before such officer, but the power to bring the action is discretionary and rests with him. But where a public officer, who is empowered by law to perform an act which concerns the public, and affects the public interest, the execution of the power where the officer fails to perform his duty may be enforced by writ of mandate.

In the State of California the writ of mandate is issued only to enforce an act especially enjoined by law as a duty resulting from an office, trust, or station.[3]

Unintentional acts committed by the officers or directors of a bank, though violations of the law and the charter of the bank, but which do not result in serious harm to the stockholders or depositors, should not be urged and is not sufficient grounds for declaring a forfeiture of the bank's charter. But acts which are knowingly committed by the directors, or with their knowledge are committed by any of the officers or agents of the bank, with a purpose to avoid or violate a law, and which, when done, cause loss or injury to any person dealing with the bank, are acts which, when proven, present sufficient grounds and authority for declaring the charter forfeited.

§ 319. Failure to comply with statutory provisions.— Grounds for forfeiture.

Where the law requires that a banking corporation shall have a capital stock, a portion of which may be paid up when the charter is granted, the remainder to be paid within a time fixed by the statute, upon a failure to pay in the remainder at such time, works a forfeiture of the charter; and in such cases, it at once becomes the duty of the Attorney-General of the State to institute an action for that purpose.

The failure of the corporation in the performance of an act required by law to be performed at a certain time, cannot be extended.

§ 320. Nonuser of charter.

Where the statute provides that a corporation shall organize within a certain period of time, and shall perform certain

[3] Price *v.* Riverside L. & I. Co., 56 Cal. 431; Priet *v.* Reis, 93 Cal. 85; Code Civ. Proc. (Cal.), § 1085.

other acts at times fixed by the law, such as the election of a board of directors, or if after its organization, and commencement of its business, it shall lose or dispose of, all of its property, and shall fail for a period fixed by the statute to transact in regular order, the business of said corporation, its corporate powers shall cease and the corporation may be dissolved at the instance of a creditor at the suit of the State on the information of the Attorney-General.[4]

It is held in the case of the People of the State of N. Y. v. The President, Directors, etc., of the Bank of Hudson, 6 Cow. (N. Y.) 216, that an information in the nature of a *quo warranto* against an incorporated company, seeking to deprive it of its franchise, on the ground of forfeiture by nonuser, may be against the company in its corporate name. The judgment is a judgment of seizure, and the court holds in this case that the corporate rights may be forfeited by a nonuser or misuser. Suffering an act to be done, which destroys the end and object for which a corporation was instituted, the court holds is equivalent to a surrender of its corporate rights, as where an incorporated bank becomes involvent, and assigns so much of its property to trustees, for the purpose of paying its debts as to prevent its resumption of banking business.

§ 321. Willful violation of law or bank's charter cause for forfeiture.

Any willful violation of law, the creating of a debt in excess of the amount provided by statute, paying dividends out of the capital stock, failing to comply with the law, which requires the bank to make official reports to the proper authority of the State or knowingly making false reports, are such offenses as would justify an action by the proper authority to forfeit the bank's charter.

In the case of People v. Oakland County Bank, 1 Doug. (Mich.) 282, where the bank under the provisions of the law and its charter is located in one county, in the absence of a statute authorizing it to establish an agency in another county, and where it establishes such an agency, receives deposits, and buys and sells exchange, held by the court that it thereby

[4] Civ. Code of Cal., § 358.

violates its charter. But the court, in discussing the facts and the question presented in this case, says:

"In view of all the circumstances disclosed in the case made, seeing that the agency in question was probably established without any deliberate intention to violate the law and that the same has been discontinued, we shall not feel disposed, as at present advised, to declare judgment of forfeiture against the defendants, but in the exercise of that broad discretion with which we are clothed, to adapt the judgment to the circumstances of the case; admonishing those interested in the bank to see to it, that in the meantime, and for all time to come, they so conduct the affairs of the institution as not to render themselves obnoxious to legal proceedings. The public demand of us and of all concerned in the administration of the law, the greatest vigilance in detecting and punishing in the most exemplary manner those who can and do wield so much power, when that power is so exerted as to be productive of evil instead of good. And, while the judgment in this case may not deprive the defendants of important privileges, a repetition of the offense will be visited with the severest penalties of the law."

The court very discreetly in this case looked into the motive and intention of the directors of the bank, and when it found that there was no willful violation of the law, it withheld its power of punishment.

In a very early case reported in 5 Ohio St., the court held that it was in violation of the act which was passed by the Legislature to incorporate the State bank of Ohio, etc., for one of the independent banks chartered by the original bank, to make loans to a director before the adoption by the stockholders of by-laws to regulate the liabilities of directors, and that such violation was a cause for forfeiture of the bank's charter.[5]

§ 322. Taking usurious interest held to be a violation of charter.

In the case of Fleckner v. United States Bank, 8 Wheat. 338, the court holds, that the statute incorporating the bank of the United States does not avoid securities on which usurious

[5] The State ex rel. the Attorney-General *v.* Seneca County Bank, 5 Ohio St. 170.

interest may have been taken, and the usury cannot be set up as a defense to a note on which it is taken, it is merely a violation of the charter, for which a remedy may be applied by the Government.

§ 323. Bank may be indicted for taking usurious interest.

In the case of State v. First National Bank of Clarke, 51 N. W. Rep. 587, it is held, that a national bank may be indicted by the State for taking usurious interest, also that the State law which makes the taking of illegal interest a misdemeanor, and in case of a corporation punishable by the imposing of a fine, is not necessarily an interference with the proper discharge of the banks' duties to the Government as will make such requirement invalid.

Where the statute of a State prescribes that all the capital stock of a corporation shall be subscribed, a bank has no authority to commence doing business until said stock has all been subscribed. And the State may bring an action to forfeit a charter where the corporation commences business before the full capital stock is subscribed.[6]

§ 324. Directors embezzling funds of bank — Mismanagement.

In the case of the Bank Commissioners v. Rhode Island Central Bank, 5 R. I. 12, where the commissioners brought an action to enjoin the bank from further doing business on the ground averred in the application, that the bank "is so managing its concerns that the public or those having funds in its custody are in danger of being defrauded thereby." The court upon the hearing of the case found that there was gross and illegal management and danger of fraud growing out of such mismanagement, and it, therefore, entered a decree appointing a receiver and perpetually enjoined the bank from further exercising the powers and franchises conferred by its charter.

§ 325. Wrongful act of a single director.

The wrongful act of a single director or officer of the bank does not constitute an offense upon which an application will lie upon the part of the State.

6 People v. Nat. Sav. Bank, 129 Ill. 618, 11 N. E. 170.

But where the board of directors sanction and have knowledge of the facts of an officer or a director, which are in violation of law, it is imputed to and becomes the act of the bank.

§ 326. Bank doing business not authorized.

A bank incorporated to conduct a commercial banking business is restricted by the law to that class of business and cannot conduct a savings bank business, or a mercantile business, or a real estate business. Likewise a savings bank incorporated for the single purpose of conducting a savings bank business, with no other power provided for by its charter, cannot conduct a commercial banking business or buy and sell commercial paper. It is confined by the law in the conduct of its business to the purpose for which it is incorporated. And a corporation that conducts a business not authorized, its charter may be revoked.[7]

Where the statute requires that a certain number of persons must sign and acknowledge the articles of incorporation, and where a corporation attempts to do business, not having complied with the law, the State may forfeit its charter.[8]

§ 327. Directors liable for losses resulting from violation of law.

The directors of a national bank are liable in an action for damages on account of their personal acts, resulting in a violation of a law, and a suit may be brought, though the Comptroller of the Currency has not procured a forfeiture of the charter.[9]

But where a receiver has been appointed to take charge of the affairs of the bank, it is held that the action should be brought by him.[10]

Where the receiver neglects or refuses to bring an action against such directors it may be brought by a shareholder.[11]

7 The People v. Utica Ins. Co., 15 Johns. 357.

8 People v. Montecito Water Co., 97 Cal. 276.

9 Stevens v. Overstolz, 43 Fed. Rep. 465.

10 Bailey v. Mosher, 63 Fed. Rep. 488.

11 Brinkerhoff v. Bostwick, 88 N. Y. 52.

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CHAPTER XLIII.

INSOLVENCY.

§ 328. Insolvency defined.

"Insolvency means, simple inability to pay, as debts should become payable, whereby the debtor's business would be broken up."

The deposits in a commercial bank are held to be debts due by the bank and are payable upon demand. Therefore, under the above definition, any commercial banking corporation upon failure to pay a deposit upon demand made upon it, would be declared insolvent.

The general rule is laid down that a bank is insolvent when unable to meet its liabilities as they become due in the ordinary course of business, and when it cannot pay its deposits on demand in accordance with its promise.

The rule is supported and held to be the law by many of the States.

In Illinois, the court holds "insolvency, as applied to a person, firm, or corporation, engaged in trade, is its inability to pay debts as they fall due in the usual course of business." [1]

In Indiana, the court in its construction of a statute, which makes it embezzlement for a banker to receive a deposit when insolvent from anyone not indebted to the bank, whereby the deposit so made shall be lost to the depositor, says:

"When a deposit of money is made, the banker in contemplation of law, has money on hand to the full amount of the sum deposited, ready to deliver when called for, and his contract with the depositor is to refund that same amount on demand. When it is not paid back on demand, as contemplated by the agreement between the banker and the depositor and this because of the insolvency of the banker, and his consequent inability to refund the amount of the sum deposited then, within the true intent and meaning of this statute, which is entitled, An Act for the protection of bank depositors, the deposits so made, or in other words of the statute, the sum

[1] Atwater v. American Express Bank, 152 Ill. 605.

fraudulently taken, is lost to the depositor. The crime created by the statute is consummated when the insolvent banker fraudulently receives the deposit, for the statute declares that such banker so receiving such deposit shall be deemed guilty of the embezzlement of the sum so fraudulently taken."

In New York, the court in the case of Levingston v. The Bank of New York, 26 Barb. 305, says:

"The bank we are told is insolvent, but how is that shown? The plaintiffs' 'information and belief' is surely no evidence, especially when in direct contradiction to the regular official reports of the bank, which being made under oath and published by express direction of law are, it is presumed, entitled to at least as much weight, judicially, as the unknown and unsworn informant of the plaintiff.

"We are left then to the mere legal inference of insolvency, resulting from the suspension of specie payments by a bank of issue.

"Is such the necessary inference from suspension, no matter what the bank's assets may amount to, in cases where suspension is general and nearly universal throughout the State and every other section of the Union? It seems to me that it is not. The statute of 1849, which being subsequent in time and especially directed to the case of banks of issue and covering precisely the same ground, would seem to supersede on these points the older enactments. This statute provides that, upon proof by the abortive return of an execution or by other satisfactory evidence before it is returned, that an execution for 'any debt or liability exceeding $100' cannot be satisfied out of any property of the bank thus sued, the judge 'shall at once make an order declaring the insolvency of such corporation or association;' to be followed, of course, by the appointment of a receiver to wind up its business. Under another section, however, a creditor without waiting the first twenty days or the subsequent sixty days, if his demand exceeds $100, may at any time after ten days from the refusal of payment, apply for an order enjoining the bank and declaring it insolvent, and on such application the judge, 'if in his opinion on the facts presented it be expedient, in order to prevent fraud or injustice,' may grant an order for a temporary injunction. After which, on hearing of the parties on

short notice, he shall determine whether the bank be 'clearly solvent or otherwise.' And even if he determine it be clearly solvent, he is required to continue the temporary injunction, if one has been granted, until full payment of the debts and costs. But if he determine that it is 'not clearly solvent,' he must not only continue the injunction, but appoint a receiver.

"Reading these provisions, can anyone say that, by a true, interpretation of the law of which they form a part, the mere suspension of specie payments of itself and by itself, settles the question of insolvency? If so, why require under one section the issuing of an execution and proof of inability to satisfy it, and under another, first a delay of at least ten days, and then a hearing on further notice and an examination of the 'officers' books, papers, accounts, assets, and effects?' Banks of issue in this State are the creatures of the law. The same law assumes that while accommodating the public they will yield an income to the stockholders; and how is such income to be realized unless they are allowed to loan, not only their capital, but a portion at least of their deposits, and that too, not returnable on demand, but on time? It assumes, therefore, in the very organization of such institutions, that in case of a panic or sudden rush, the banks, although amply able and clearly solvent, may not have specie enough on hand immediately to satisfy all claims. Hence the Act of 1849, instead of authorizing a permanent injunction upon a mere refusal to pay in specie, expressly requires further 'proof satisfactory to a justice of the Supreme Court,' that the demand of the plaintiff 'cannot be satisfied out of any property of the defendant,' or that after a full hearing of the parties, it shall appear, and be so determined, that the institution is 'not clearly solvent.'

"In the present case it is now admitted that the bank has property not only sufficient, but in every respect more than sufficient to satisfy all demands. Within the meaning of the statute, therefore, it is 'clearly solvent,' and, of course, not a subject for the extraordinary decree prayed for in the complaint. For that reason, as well as for the reason that no 'fraud or injustice' is alleged or pretended, it is, in my 'opinion, on the facts presented,' not only 'not expedient,' but on the contrary hightly inexpedient, to grant a 'temporary in-

junction,' or an order to show cause why such an injunction should not be issued."

The more liberal rule and one which in justice should be applied to all debtors and particularly to a banking corporation, is that a bank is solvent when it possesses sufficient solvent assets to pay all its liabilities within a reasonable time.

Upon a construction of the statute and Constitution of the State of Missouri, rendered by the Supreme Court of the United States, in the case of Dodge v. Masten, the court in defining the word "solvent" and the phrase "in failing circumstances," says:

"I will proceed next to define the meaning of the word 'solvent' and the phrase 'in failing circumstances,' used in the statutes and Constitution. In the ordinary acceptation of the term 'insolvent' when applied to a bank, means inability to meet liabilities in the usual course of business. But a bank may be solvent and yet, from temporary causes, over which its officers have no control, suspend until these causes can be overcome. But they must be causes for which prudence and foresight cannot provide or over which the bank or its officers had no control or could have none. Such causes when they do occur are usually soon overcome. The bank again takes up its business and proceeds with it in the usual way. The failure of the First National Bank of Kansas City, Missouri, on the 29th of January, 1878, would not have been a good cause for suspension, for that could have been, and as we have seen, was overcome by means, however, which may aid you in determining the solvency of the Mastin Bank at the time of its failure. As much of what I shall say upon the phrase 'in failing circumstances' applies also to solvency and insolvency of a bank, I pass to this branch of the case with the declaration that a bank is solvent, within the meaning of the Constitution and statutes we are considering, when it possesses sufficient of assets to pay within a reasonable time all its liabilities through its own agencies, and is insolvent when from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, and, therefore, makes an assignment by which the control of its affairs and property passes out of its hands. The phrase 'in failing circumstances,' used in the Constitution and statutes, when applied to a bank,

must be taken to mean a state of uncertainty, whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur and over which its officers have no control. Thus, for instance, an individual may be said to be in failing circumstances when he is put to unusual shifts to meet his liabilities, such as borrowing money at unusual rates of interest, makes sacrifice in the disposition of his property, which he would not do but for his condition. Such a condition of things may exist regarding a bank, and when this is the case, a bank, like an individual, may be said to be in failing condition. The funds of banks are supposed to be ready at hand to meet the wants of commercial, trading, and manufacturing communities in which they are located. Anything interfering with the availability of its funds, such as the carrying of large debts upon which nothing can be realized, except after long delays, investments in real estate which it may take time to turn into current funds — and all of these things when they occur, may or may not tend to show whether a bank is in failing circumstances."

In California, the Civil Code provides that "a debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means as they become due."

The Supreme Court of the State of California in the case of Sacry v. Lobree, 84 Cal. 41, in discussing the meaning and definition of an insolvent under this statute, says (quoting the testimony of Lobree, the defendant): "'I think the account of Murphy, Grant & Co., held by Crawford & Tabor, was $160. I was owing them at the time. Their debt was then due. I could have paid them in a few days. I was not able then to pay it. I can't say whether I owed any other creditors, whom I was unable to pay as their accounts became due, or not. * * * I did not pay my bills as they became due, because I did not have the money. I had no bank account. I was attached at 9.30 o'clock Saturday night, and I made the assignment and conveyance to Lobree about 8 o'clock Monday morning. The keeper was in charge then of these goods that had been attached. At the time I made the assignment and conveyance I did not know that I was owing more money than I could pay, but I knew that I could not pay all at once what

I owed then. There was more money due my creditors then than I could have paid if they had demanded immediate payment. I did not have money enough in my hands to pay my debts as they became due. I had merchandise. Only one side of the store was attached. * * * I had property enough to pay everybody, and I wanted to pay everybody. I did not have money enough at the time to pay them. I had made no proposition to my creditors for a settlement.'

"It is claimed that this testimony shows a clear and distinct confession of insolvency, but we do not think that this claim can be maintained.

"It has been held, under the United States Bankrupt Act, that a trader is insolvent when he is unable to pay his debts as they become due in the ordinary course of business. (Toof v. Martin, 13 Wall. 40; Wager v. Hall, 16 Wall. 584.) In the case first cited the district judge had ruled that 'if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent.' Speaking of this the Supreme Court, by Mr. Justice Field, said:

"'The rule thus laid down may not be strictly correct as applied to all bankrupts. The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used, in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent; and as applied to them, it is the sense intended by the act of Congress. It was of the bankrupts as traders that the district judge was speaking when he used the language which is the subject of criticism by counsel. With reference to other persons not engaged in trade or commerce, the term may, perhaps, have a less restricted meaning. The Bankrupt Act does not define what shall constitute insolvency, or the evidence of insolvency, in every case.'

"It was further said: 'In the present case the bankrupts were insolvent in both senses of the term at the time the conveyances in controversy were made.'

"In Bump's Law and Practice of Bankruptcy (5th ed.), page 469, it is said: 'Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the bankrupt courts that a trader who is not able to pay all his debts in the usual and ordinary course of business, as persons carrying on trade usually do, is insolvent, within the meaning of the Bankrupt Law, and there is no better general rule to govern courts when they are considering the facts of a case. It is neither too broad or too narrow, while it would be quite too narrow and restricted to hold that failure to pay some one debt when due is evidence of insolvency in all cases under the act. Whether a single instance of non-payment of a debt at maturity would be evidence in a given case of insolvency depends somewhat upon the magnitude of the debt, the locality of the debtor, and what is the ordinary course of business and custom, in that respect, of the locality where the debtor resides, and upon such other facts and circumstances as bear upon the question of insolvency. * * * The question is whether the debtor or trader is able to pay his debts in the ordinary course as persons carrying on trade there usually do. Hence, it may be, and undoubtedly is, true that insolvency in commercial centers is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* insolvent; whereas, in the latter localities, it is not so. Insolvency is a fact and not a matter of definition or rule of law; and what is evidence of insolvency in London or Paris or New York is not evidence of insolvency everywhere.' (Citing cases.)

"The Insolvent Act of this State provides that a debtor may be put into involuntary insolvency if he, 'being insolvent, has suffered his property to remain under attachment or legal process for four days' (§ 8), but it nowhere defines what shall constitute insolvency. The Civil Code, however, in the title in regard to assignments for the benefit of creditors (§ 3450), says: 'A debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means as they become due,' and it has been held that this is the correct

definition of insolvency under the Insolvent Act of 1880. (Washburn v. Huntington, 78 Cal. 573.)

"What is meant by the words 'from his own means?' The definition of the word 'means,' as given by Webster, is 'resources or income.' But 'resources' does not necessarily mean money in hand. A debtor may have ample resources to pay all his debts as they become due, and yet have no money in his pocket or in bank. Is such a debtor insolvent? Suppose a wheat buyer should have a thousand tons of wheat in a warehouse, worth $25,000, which he is holding for better prices, and is indebted in the sum of a thousand dollars. Is he insolvent unless he sells the wheat at whatever price he can get, and pays the debt as it becomes due? We do not think he is, under the Insolvent Law of this State.

"In Bell v. Ellis, 33 Cal. 620, it was held that a trader is insolvent when he is not in a condition to meet his engagements, or to pay his debt in the usual and ordinary course of business; but he is not so merely because his assets, at a given date, may not satisfy all the demands against him due and to become due. The court said: 'The test question is not, will his effects realize enough to pay his debts due and to become due? but, are his affairs in such a condition as to enable him, in the usual and ordinary course of his business, to make his payments as they fall due? and the question is to be answered by the jury in view of all the circumstances affecting the business of the trader, including the value of his effects, the extent and character of his business, the manner in which it was being conducted, whether upon a speculative or legitimate and safe basis, the amount of his profits, the extent of his liabilities, whether kept within a safe limit, and generally his credit, accompanied by the benefit or advantage which he has, outside of the mere value of his property and the debts due him, arising from the good will of the business.'"

§ 329. Means may exist in another State.

Referring to the California statute, it is not essential that the means from which the debts are to be paid must exist in this State; nor is the debtor to be considered insolvent, merely because he has not means in this State to pay his creditors here.[2]

[2] Cook v. Cockins, 117 Cal. 140.

§ 330. Officer taking deposit with knowledge of bank's insolvency — liable when.

A leading case determined by the Supreme Court of the State of Iowa, holding an officer liable for receiving money when he had knowledge of the insolvency of the bank, is reported in the case of the State of Iowa v. Eifert, 102 Ia. 188.

The facts in this case briefly stated are as follows: A banker's son and employee received a deposit when the insolvency of the bank was known, and an hour or two before it finally closed. He received this deposit contrary to a telephone message from the banker "to take no more deposits." When the banker reached home he, having knowledge that the deposit had been received, made no effort to, and failed to, return it, and four days later included the same in a general assignment for the benefit of his creditors.

The defendant was indicted and convicted of fraudulent banking and sentenced to be confined in the State penitentiary for two years and six months, and to pay costs.

The defendant was tried and convicted under a statute of the State, which reads as follows:

"If any such bank, banking house, exchange broker or deposit office, firm, company, corporation, or party, shall receive or accept on deposit any such deposits, as aforesaid, when insolvent, any officer, director, cashier, manager, member, party or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept or be accessory to or permit or connive at the receiving, or accepting on deposit therein or thereby any such deposit as aforesaid, shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the State prison for a term not to exceed ten years, or by imprisonment in the county jail not to exceed one year, or both fine and imprisonment, the fine not to exceed ten thousand dollars."

In the absence of a statute which prescribes no remedy, a common-law action may be resorted to.[3]

§ 331. Officer must have actual knowledge of insolvency.

Actual knowledge of insolvency must be shown; and in order to sustain a conviction it must be shown that the defendant had some direct personal connection with the receipt or accept-

[3] Cummings v. Winn, 89 Mo. 51.

ance of the deposit; being in the bank, and in a room other than where the deposit is received by the bank, is not knowledge.[4]

It is held in the case of Stout v. Lusk, 9 Kas. App. 694, that the provisions of a State statute providing a penalty are not applicable to national banks and their officers.

The contrary doctrine is that in the State of Iowa the statutory provisions as to fraudulent banking applies to national banks as well as to State banks.[5]

In the State of Minnesota the law holds the directors of a bank liable for accepting through its teller a deposit, where they have knowledge of the bank's insolvency, and where the depositor is ignorant of such insolvency. The acts of the teller in such cases are held to be the acts of the directors.[6]

§ 332. Insolvency — National banks.

Section 918, Revised Statutes of the United States (1879), provides that "any bank officer who violates the provisions of section 918, Revised Statutes, by receiving deposits for his bank, or by assenting to the same with knowledge that the bank is insolvent or in failing circumstances, is individually responsible for such deposits so received, and the depositor may maintain an action against such officer for the amount of his deposit."

The depositor, and not the assignee of the bank, is the proper party to institute the suit authorized by the foregoing section.[7]

By the provisions of section 3 of the Act of March 2, 1897, entitled "An Act authorizing the appointment of receivers of national banks, and for other purposes," it is provided that the shareholders may manage the liquidation of the bank.

§ 333. Deposits may be recovered, when.

The general rule, as laid down in a New York case, is that a depositor may recover funds deposited in a bank, if at the time of making the same, the officer accepting the same had knowledge of the fact that the bank was hopelessly insolvent.

The reason of the rule is, that the deposit is obtained by fraud.[8]

4 The State v. Warner, 60 Kan. 94.

5 State v. Fields, 62 N. W. 653.

6 Baxter v. Coughlin, 70 Minn. 1.

7 Cummings v. Winn, 89 Mo. 51.

8 Cragie v. Hadley, 99 N. Y. 131.

Where an endorser paid a note to a bank and took the banker's receipt therefor, but the bank failed to make the proper application of the money, and afterward went into insolvency, it is held that the money may be recovered.[9]

It is held in the case of Citizens' Nat. Bank v. Dowd, 35 Fed Rep. 340, that a creditor of an insolvent national bank, where his demand grew out of a fraudulent transaction, perpetrated by the bank, and in contemplation of wrecking the same, that he does not become a preferred creditor.[10]

The general rule as laid down by the Illinois courts is that "one who deposits a check in a bank, and receives credit therefor, is not entitled after the check has been paid by the drawee bank and the proceeds thereof so mingled with other money of the bank in which it was deposited, as to lose their identity as a fund, to be made a preferred creditor for the amount of the check, upon the voluntary assignment of the latter bank, a few days after receiving the check, although the officers then knew the bank was insolvent."

The court in the case of Lanterman v. Travous, 174 Ill. 459, further says: "It has frequently been announced as the law of this State that even in a case where a definite and actual trust fund which possesses all the attributes of a separate and distinct identity has been so mixed and mingled with other funds as to render identification impossible, the *cestui que trust* in the event of the insolvency of the trustee is remitted to the position and the rights of a general creditor."

The rule, as laid down in Nebraska, is that a creditor may follow his money while he can trace and distinguish it or the proceeds thereof, but not after it has passed into the hands of the assignee, and is mingled with the other funds of the bank, and the fact, that the bank is insolvent within the knowledge of its officers and receives the money of the depositor which amounts to a fraud upon him, is not of itself sufficient to entitle the latter to a preference from the funds of the bank in the hands of an assignee.

The court, in the case of Higgins v. Hayden, says: "Where

[9] Massey *v.* Fisher, 62 Fed. Rep. 958; Lake Erie & Western R. R. Co. *v.* Indianapolis Nat. Bank, 65 Fed. Rep. 690.

[10] Citizens' Nat. Bank *v.* Dowd, 35 Fed. Rep. 340.

a bank remains open, holding itself out as ready to transact business, this is an implied representation of solvency, and for it to receive a deposit when its insolvency is known to its officers is a fraud upon the depositor. * * * The depositor may, therefore, at his election rescind the contract of deposit and recover back the money or property, but he must do so before the deposit has become commingled with the general assets of the bank.[11]

§ 334. Special deposits recoverable.

The rule is well settled, that a special or specific deposit which has actually been kept separate antd not intermingled with the general deposits of the bank, and which can be identified, may be reclaimed.[12]

§ 335. Insolvency demonstrated.

The Supreme Court of the United States in the case of Roberts v. Hill, 23 Blatchf. 312, says that "insolvency as ordinarily defined is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of business. * * * An act of insolvency takes place when this state of affairs is demonstrated and the merchant has actually failed to meet some of his obligations. A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations."

§ 336. Set-off.

The rule is laid down that "*the right to set-off must be governed by the state of things existing at the moment of a bank's insolvency.*"[13]

The provisions of section 5242, Revised Statutes of the United States, does not prohibit any legal or equitable set-off which a debtor of a bank may have against any obligation owing by him, to it at the time of the bank's insolvency.

11 Higgins *v.* Hayden, 53 Neb. 61.

12 American Express Nat. Bank *v.* The Lorietta Gold & Silver Mining Co., 165 Ill. 103; Vail *v.* Newark Sav. Inst., 32 N. J. Eq. 631.

13 Cook County Nat. Bank. *v.* United States, 107 U. S. 445; Ainsworth *v.* Bank of California, 119 Cal. 470; Stephens *v.* Schuchmann, 32 Mo. App. 333.

The Supreme Court of the United States in the case of Scott v. Armstrong, 146 U. S. 499, defines the rule to be "that where the mutual obligations have grown out of the same transactions, insolvency, on the one hand, justifies the set-off of the debt on the other."

Equitable set-off.

The deposit of a depositor (in an insolvent commercial bank) may be set off against his note, matured or immatured.[14]

A depositor cannot purchase a debt after insolvency for the purpose of set-off against a debt owing by himself.

Neither can the maker of a note which is sued upon by the cashier set off certificates of deposit purchased by him for that purpose after the bank became insolvent.[15]

Interest.

The rule is that the debt of the creditor as against an insolvent bank continues to draw interest. Where a shareholder is liable for the debts of the bank, he is liable for interest to the extent to which the bank would have been liable not in excess of the maximum liability fixed by the statute.[16]

Dividends.

The Supreme Court of the United States, in the case of Merrill v. National Bank of Jacksonville, very fully discusses the rights of a secured creditor of an insolvent national bank to prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency.

Mr. Chief Justice Fuller, in delivering the opinion of the court, says:

"Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have secu-

14 Armstrong, Receiver, v. Warner et al., 49 Ohio St. 376; Camden Nat. Bank v. Green, 45 N. J. Eq. 546; Kentucky Flour Co. v. Merchants' Nat. Bank, 90 Ky. 225; Mercer v. Dyer, 15 Mont. 317.

15 Dyer v. Sebrell, 135 Cal. 597; Davis v. Knipp, 92 Hun (N. Y.); Storth v. George, 150 Mo. 1.

16 Richardson v. Irons, 121 U. S. 27.

rity or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their security ceases, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."[17]

Debts due savings bank.

A State statute which provides that deposits made by a savings bank in a national bank, which becomes insolvent, shall be first paid, is in conflict with the National Bank Laws.[18]

Rule — Set-off — Insolvent savings bank.

The general rule is that a debtor to the bank for money borrowed can not set-off the amount of his deposit against his indebtedness.[19]

This rule applies to *mutual savings banks, such as are purely mutual and have no capital stock;* but where savings banks are incorporated institutions with a capital stock, in the absence of a special statute, a depositor in such a bank, especially if the relationship created by the deposit becomes one of debtor and creditor, the general rule and right of set-off existing would prevail.

17 Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131.

18 Davis *v.* The Elmira Savings Bank, 161 U. S. 275; Auburn Savings Bank *v.* Hayes, 61 Fed. 911.

19 Hannon *v.* Williams, 34 N. J. Eq. 255.

CHAPTER XLIV.

DISSOLUTION.

§ 337. Voluntary liquidation.

The National Banking Act, section 5220, provides that "Any association may go into voluntary liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

A meeting of the stockholders must be held and notice of the date and purpose of the meeting must be given to all the stockholders.

It requires two-thirds of all the stock of the bank, voting in the affirmative, to place the bank in liquidation.

The rights of the minority stockholders are not considered. Their wishes and interests, although affected adversely, cannot be heard.[1]

§ 338. Authority of officers in charge.

"Without express authority from the shareholders in a national bank, its officers, after the bank goes into liquidation, can only bind them by acts implied by the duty of liquidation."[2]

The stockholders' rights cannot be affected by the acts of the president done after the bank is placed in liquidation.[3]

§ 339. Liquidation does not dissolve corporation.

It continues as a body corporate under the provisions of law governing national banks until its affairs are closed, and may sue and be sued for the purpose of winding up its business.[4]

A State bank, unless the statute expressly provides that its charter shall be dissolved by the act of liquidation, can liquidate all of its affairs, *i. e.*, pay all of its debts and afterward reorganize and again do a banking business.

1 Watkins *v.* Nat. Bank, 51 Kan. 254.

2 Richmond *v.* Irons, 121 U. S. 27.

3 Schrader *v.* Manufacturers' Bank, 133 U. S. 67.

4 National Bank *v.* Insurance Co., 104 U. S. 54.

A banking corporation may fail in business and its affairs be liquidated by a receiver appointed by the court and if its debts are all paid the stockholders remain the owners of the charter and may, after a compliance with the provisions of law as to the repayment into the bank of the capital required before the commencement of business, again conduct a banking business. Liquidation does not dissolve the charter in the absence of a statute to that affect. The charter of a corporation can only be forfeited by a suit instituted by the State, and the act of liquidation is not one which would authorize the forfeiture of a charter.

§ 340. Liquidation dividends.

"Liquidation dividends of a national bank belong to the holder of the shares, whether those shares be recorded upon the books of the bank or not and must be paid to the holder of such shares on demand." [5]

5 Savings Institution v. National Bank, 89 Me. 500.

CHAPTER XLV.

EXTENSION OF CORPORATE EXISTENCE.

§ 341. National banks.

The act of July 12, 1882, provides that national banks may extend their charter in accordance with said act, which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that any national banking association organized under the Acts of February 25, 1863, June 3rd, 1864, and February 14th, 1880, or under Sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six and fifty-one hundred and fifty-four of the Revised Statutes of the United States, may, at any time within two years next previous to the date of the expiration of its corporate existence under the present law, and with the approval of the Comptroller of the Currency, to be granted, as hereinafter provided, extend its period of succession by amending its Articles of Association for a term of not more than twenty years from the expiration of the period of succession named in said Articles of Association, and shall have succession for such extended period, unless sooner dissolved by the act of share holders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed."

The application to extend the corporate existence is made by the president of the bank and is addressed to the Comptroller of the Currency. For form of application, see Appendix.

The powers of attorney, signed by the shareholders, should be sent to the Comptroller, with the amendment to the article of association on which their names, signed by their authorized attorney, appear.

If preferred, a shareholders' meeting may be called in order to vote for the extension and to sign the necessary papers.

Proper notice of the meeting should be given to the shareholders. At this meeting the shareholders may appear in person or by attorney. In executing and forwarding the papers the following intsructions should be strictly observed:

"The certificate of the president or cashier certifying that shareholders owning at least two-thirds of the stock having consented, in writing, to the amendment, should be executed in duplicate and one copy transmitted to this office, together with the letter applying for approval of the Comptroller, at least two months prior to the expiration of the corporate existence of the bank, in order that the Comptroller may have sufficient time to cause the special examination to be made, as required by section 3 of said act.

"If any shares of the bank stand in the name of administrators, executors, trustees, or guardians, and it becomes necessary to have the votes of these shares to make up the majority required to authorize the amendment, duly certified copies of the legal appointment of such administrators, executors, trustees, or guardians should be sent to the Comptroller. In the case of stock held by a corporation, a certified copy of a resolution of the board of directors authorizing the president or other officer to consent to the amendment, is required.

When stock voting for an amendment stands in the name of an assignee, there must be evidence showing that the shares of stock have been regularly transferred to him, as such assignee, on the books of the bank. When the amendment is signed by an attorney acting for shareholders, properly executed powers of attorney must be furnished."

Upon the receipt of the papers in due form, the Comptroller will order the special examination required by section 3, which must be paid for by the bank, and if the report of the examiner is favorable, the Comptroller will, at the date of expiration of charter, issue his certificate of extension.

With but few exceptions there is no provision made by the laws of the various States for extending the charters of banks. When the life of the charter expires, if the bank desires to continue in business it must proceed to reincorporate and comply with the law in force at the time of its reincorporation.

CHAPTER XLVI.

CLEARING-HOUSE.

§ 342. History of the clearing-house.

The origin or history of the clearing-house as given by Bouvier is presented as follows:

"The origin of the system is said to have been in Edinburgh; at least the bankers of that city so claim, but the earliest record of one (and that is not clear as to date) is that of London, founded in 1775, or possibly earlier. It was started in the alehouse of those times, the general resort of proprietors of new enterprises. The system, however, increased in usefulness so much as to require rooms, which were procured in Lombard street, and a system was rapidly developed of exchanging checks and other securities to reduce the amount of actual money required for settlements. In this country such associations were established in New York, in 1853, Boston, in 1856, Philadelphia, Baltimore, and Cleveland, in 1858, Worcester, in 1861, Chicago, in 1865, and since that date the number increased rapidly to thirty-one in 1884 (Bolles, Proct. Bkg.), and the system is now extended to most of the cities in which there are several banks. They also exist in Australia, France, Germany, Switzerland, Italy, and other continental countries of Europe. Most of these associations are unincorporated, but in Minnesota there is an act (March 4, 1893) for their incorporation. The Clearing-house Association of New York consists of all the incorporated banks — private bankers not being admitted as in London. Two clerks from each bank attend at the clearing-house every morning, where one takes a position inside of a counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand parcels containing the checks on each of the other banks received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents — until, having walked around, they find themselves at their own desk again. At the end of this process the representative of each bank has

handed to the representatives of every other bank, the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the clearing-house a balance in money. Balances are settled daily. In London the practice of presenting checks at the clearing-house has been held a good presentment to the banker at law. It is not usual to examine the checks until they are taken to the bank, and if any are then found not good they are returned to the bank which presented them, which settles for such returned checks. In this country when a check is returned not good through the clearing house, it is usually again presented at the bank."

§ 343. Character and object.

The character and object of a clearing-house, as formed by the co-operation of a number of bankers in the city of Philadelphia some years ago, is very correctly defined by the court in the case of Philler v. Patterson, 47 Am. St. Rep. 896.

The court after examining the constitution or articles of association adopted by the banks, then says:

"In substance these articles amount to an agreement with each other by thirty-eight national banks in the city of Philadelphia to facilitate and simplify the settlement of daily balances between them for their mutual advantage. This agreement substitutes a settlement made at a fixed time and place each day, by representatives of all the members of the association, in the place of a separate settlement by each bank with every other made over the counter. No other object is contemplated or provided for. The association does not provide for any united action for any business purpose. It does not contemplate the employment of capital or credit in any enterprise. It proposes and provides for co-operation to expedite and simplify the transaction by each member of the association of its own proper business in one particular, viz., the settlement of daily balances with the other national banks doing business in the city. Incidentally, co-operation in this particular would tend to bring the banks belonging to the association into closer relations, enable them to become more familiar with the volume of business and the actual condition

of each other, and open the way to make them mutually helpful in times of financial stringency, but these results are incidental only. The Clearing-house Association is nothing more nor less than an agreement among thirty-eight national banks to make their daily settlements at a fixed time and place each day."

The mode of putting the agreement or articles of association of the clearing-house into operation, is then given by the court in the following language:

"To carry this agreement into operation it became necessary to determine the place and hour at which the settlement should be made. A suitable room was secured, fitted up with desks and other necessary appliances at the expense of the associated banks, and a manager chosen to preside over it and direct the action of the clerks and runners when in session. This room is the clearing place, or in the language of the constitution of the association, the clearing-house. It is the place where the representatives of the several banks meet and where all balances are struck and settled daily between the banks composing the association.

"At the close of each meeting the amount due to and from each bank is definitely ascertained. The debtor banks then pay over to the manager the gross balance due from them to settle their accounts with all the members of the association, and he makes distribution of the sum so received among the creditor banks entitled to receive them. The clearing-house is, therefore, not a business organization, a corporation, a partnership, or an artificial person of any sort, but a place in which the members of the association settle with each other daily. We come now to consider the committee and the position in the general scheme occupied by it. Among the economies in time and labor contemplated by the banks was a settlement of daily balances without the necessity for handling and counting the cash in every case. To provide for this the banks agreed that they would deposit in the hands of certain persons, to be selected by them and to be called the clearing-house committee, a sum of money or its equivalent in good securities, at a fixed ratio upon their capital stock, to be used for payment of balances against them. For these sums the committee was to issue receipts or certificates in convenient sums, and these

receipts or certificates were to be used in lieu of the cash they represented, which remained in the hands of the committee pledged for the payment, when payment became necessary, of the certificates. The committee held the funds and securities deposited with them in trust for the special purpose of securing the payment as far as they would reach of the balances due from the bank making the deposit.

"On September 24, 1873, the associated banks entered into another agreement with each other by which, 'for the purpose of enabling the banks, members of the Philadelphia Clearing-house Association, to afford proper assistance to the mercantile and manufacturing community and also to facilitate the interbank settlements resulting from the daily exchanges,' they authorized the committee to receive from any member of the association additional deposits of bills receivable and other securities and issue certificates therefor 'in such amount and to such percentage thereof as may in their judgment be advisable.' The additional certificates, if issued, they agreed to accept in payment of daily balances at the clearing-house on the condition that the securities deposited therefor should be held by the committee 'in trust as a special deposit pledged for the redemption of the certificates issued thereupon.' The committee were made, both by the original articles of association and by the aditional contract of 1873, trustees or agents for all the members of the association, with authority to accept deposits in money or securities and to issue their own receipts therefor, the money or securities remaining in their hands in pledge for the redemption of the receipts or certificates so issued by them. When a bank to which certificates had been issued under the original plan or the contract of 1873 failed to redeem them when their redemption became necessary, it was the duty of the committee to collect the securities in their hands and apply the proceeds to the payment of the holders of the certificates. The deposits were made and the certificates issued under an unconditional pledge of the securities to the committee for the payment of the certificates, and their title could only be divested by the payment of the sums for which the securities were pledged. The entire plan on which the settlements are made is, therefore, a device adopted by the banks to facilitate their legitimate business as banks, and involves no element

of speculation, and no business undertaking by or on behalf of the associated banks."

The method of puting into operation the business of the clearing-house formed in Philadelphia in 1873, may differ in detail from that followed in other cities, but the character and object of all are the same.

The principle and prime purpose of the clearing-house is to settle daily the accounts between members, and at the same time and place make payments of balances resulting from the exchanges.

§ 344. Organization — Not a corporation.

A clearing-house association is a voluntary organization which, as we have found, may be created by any number of banks or bankers doing business in the particular city or place where formed.

Its affairs are governed by a constitution and rules adopted by agreement between the banks forming such association.

It has been said that a clearing-house association may be incorporated. Where corporations are formed, they are governed as to their purpose and power, by the law of the State or the law under which they are created.

A clearing-house may be incorporated, but its members or stockholders can only be persons or corporation banks which are authorized by law to subscribe for and hold stock in other corporations.

The National Banking Law prohibits a national banking association "from purchasing or subscribing to the stock of another corporation."[1]

It will be seen, therefore, that the law excluding a national bank from purchasing or subscribing to stock of another corporation, would prevent it from membership as a stockholder in a clearing-house association, if incorporated with a capital stock; and where the law of a State prohibits a State bank from subscribing or holding stock by purchase in another corporation such inhibitions would also prevent a State bank from membership in an incorporated clearing-house association.

It will be seen, therefore, that it must be a voluntary association in order that national banks may become members.

1 California Bank v. Kennedy, 167 U. S. 362.

A voluntary clearing-house association is not an institution in violation of the Statutes of the United States relating to national banks. See Philler v. Patterson, 47 Am. St. Rep. 896, but if it became an incorporated association, it might be a violation of the statute.

The association as it now exists is not in conflict with law. It may organize by adopting a constitution and by-laws or rules for its guidance.

§ 345. Rules of association.

The rules or by-laws adopted by the association must be such are are reasonable and not in violation of any law.

The Supreme Court of the State of Massachusetts in the case of Manufacturers' National Bank v. Thompson, 129 Mass. 438, declares that the rules of the clearing-house association are adopted solely for the purpose of facilitating exchanges among the banks; and where banks in a city form themselves into a voluntary association for the purpose of making clearings and for their mutual benefit, they are governed and bound by the rules of the association.[2]

In the case of Preston and others v. Canadian Bank of Commerce, 23 Fed. Rep. 179, the court, in discussing the rule of the Chicago Clearing-house, which reads as follows:

"All checks received in the morning exchanges, not found good, are to be returned the same day received before one and a half p. m. to the member from whom received, who shall immediately reimburse the holder of the same," holds that it is entirely competent for members of a clearing-house association, who are dealing with each other, to make an agreement binding upon the members.

§ 346. Non-member bank not affected by clearing-house rules.

In the case of Overman v. Hoboken City Bank, 2 Vroom. (N. J. L. Rep.) 563, the court in discussing the question of a bank representing as an agent parties who are not members, says:

"Moreover the entire system on which the business of the clearing-house is transacted is inconsistent with the theory

[2] O'Brien et al. *v.* Grant, 146 N. Y. 163, 173; Exchange Bank *v.* Bank of North America, 132 Mass. 147.

that any of the members, in their transactions with each other, are the agents of parties who are not members. They trust each other as principals, and hence the facility with which that immense business is transacted. If each member were bound, as in ordinary business, to stop to inquire into the fact of agency, and the responsibility of principals, the association could not profitably live a day. Besides, if the several members have the power, in any given transaction in the clearing-house, of acting for a stranger to the institution, and in his behalf and name, such stranger, *pro hac vice*, would stand in the position of a member — a circumstance repugnant to the nature of the organization of the association, as it is represented to this court in the evidence."

A custom or special usage of trade which may confuse the operations of the general rules of law, should be construed strictly and should not be extended to persons who are not clearly proved to have acted under them.

As between a bank and the drawers and payees of checks which have been drawn thereon, the relation is controlled by the well-settled principles of the law merchant; which rules cannot be altered or modified by a rule or custom passed by a clearing-house.[3]

§ 347. Settling daily exchanges.

The mode of settling daily exchanges through the clearing-house is accomplished by the following method:

"At the hour named a runner and a settling clerk representing each bank met at the clearing-house. These representatives of the respective banks brought with them, in separate sealed packages, the checks which the banks they represented held against other banks. The runner of each bank thereupon delivered to the settling clerk of the others these packages, taking receipts therefor, so that at the common place of meeting the clerk of each bank received from every other bank the checks drawn against the bank he represented. The making up of these packages for exchange is thus provided for in the rules:

"'Rule III. Sealed packages, well gummed and sealed with wax and endorsed with ink or indelible pencil, shall be used

[3] People *v.* St. Nicholas Bank, 77 Hun (N. Y.), 160.

exclusively in the morning exchange in the runners' exchange, and the amounts stated thereon shall be the basis of settlement. These packages, with the seals unbroken, shall be delivered by the messengers of the several banks to their respective institutions; otherwise, no responsibility shall attach to the sender.'

"After these packages had been received the settling clerk of each bank made up from the indorsements on the packages delivered to him the debts, and stated the credits arising from the sum of the packages delivered by the runner of his bank to the settling clerks of the other banks. The sheets thus made up were then turned over to the manager of the clearing-house, by whom they were verified and consolidated. The manager's balance sheet hence, necessarily, contained a statement itemizing the aggregated debts and credits of all the banks concerned in the clearing. Where any fractional sum was due by a bank in consequence of the clearing, this fractional sum was paid to the manager by a due bill, the manager treating this due bill as cash, deposited it in the bank where his account was kept and the sum of this due bill became a credit item in favor of the bank holding it in the clearing of the next morning."

§ 348. Presentment of collection through clearing-house.

The Supreme Court of the State of Massachusetts says that a note sent through a clearing-house to a bank at which it is payable, is not a demand for immediate payment made during business hours, but was equivalent to leaving the note at the bank for collection from the maker on or before the close of banking hours; and that the payment of such a note at the clearing-house, was a provisional payment only which became complete when the note was paid in the usual and ordinary course of business.[4]

Where there has been due presentment of a check to the drawee and payment demanded and refused, the drawer, if otherwise liable, is not discharged because of failure to present the check at the clearing-house in accordance with a universal usage, though it would have been paid had it been so presented.[5]

[4] National Exchange Bank v. Bank of North America, 132 Mass. 147.

[5] Kleekaup v. Myer, 5 Mo. App. 444.

§ 349. Effect of clearing-house customs between member banks. In an action by one bank against another, where both were members of a clearing-house, to recover the amount of a note which was included in the account in the clearing-house of the defendant bank against the plaintiff bank at which the note was payable, and returned by the plaintiff to the defendant after the close of business hours, if there is evidence of a universal custom among the members of the association which choose to clear their notes through the clearing-house in place of presenting them for payment at the bank where they are payable; and where notes included in clearing-house settlement, which turn out to be not good and are not returned to the paying bank before its time of closing, the conditional payment becomes absolute.[6]

§ 350. Settlement between banks members of clearing-house. A settlement made by two banks through the clearing-house, in which checks are presented and exchanged, and the balance between them is struck, will be final and conclusive if either fails to give notice of maturity to meet the balance against it on the general adjustment, before the hour when banks usually pass credit to the checks of their depositors.

The mutual credit thus given cannot be recalled by either one to the detriment of the other.[7]

If by any mistake of fact a check so paid but not good was retained until after the hour fixed, the payment is held to be treated as payment made under a mistake of fact to the same extent and subject to the same right of reclamation as if it had been made without the intervention of the clearing-house.

§ 351. Rules in Massachusetts where check was paid under mistake of fact.

Where a check has been paid under a mistake of fact, the rule that the bank paying it can recover the amount from the bank to which it was paid, is good, provided that the latter had not changed its position between the hour named for return and the return of the check.[8]

6 Atlas Nat. Bank *v.* National Exchange Bank, 176 Mass. 300; O'Brien et al. *v.* Grant, 146 N. Y. 163.

7 Blaffer et al *v.* Bank, 35 La. Ann. 251; Merchants' Nat. Bank *v.* National Eagle Bank, 101 Mass. 281.

8 Merchants' Nat. Bank *v.* National Bank of Commonwealth, 139 Mass. 513.

The Federal Court, in the case of Preston v. Canadian Bank of Commerce, 23 Fed. Rep. 182, in discussing the law and rule as laid down by the Massachusetts court, says:

"It seems to me that the Boston case has gone to the very verge of the application of the rule that money voluntarily paid under a mistake can be recovered back; and it is noticeable that the next succeeding case in the volume of Massachusetts Reports in which the case relied upon by the plaintiffs is reported, was where a bank sued to recover on the ground they had paid a check by reason of having made a mistake of fact as to the amount to the credit of the drawer, and the court held that no such recovery could be allowed, because it was laches to make such a mistake of fact.

"If parties competent to contract within what time they may correct mistakes in their dealings with each other have so contracted, it seems to me the courts have no right to override or disregard such an agreement. If a mistake which is discovered within an hour, or within ten minutes, after the expiration of the time limited by the agreement for its correction may be corrected, I can see no reason why it cannot be corrected a week afterward, or whenever it is discovered. The Massachusetts court puts its decision on the ground that you may correct a mistake of this kind at any time after it is discovered, if it places the party to whom the check is returned, in no worse condition than it would have been if it had been returned within the stipulated time; thus, overlooking the rule that parties may agree that they shall not have the right to correct mistakes unless done within a limited time."

§ 352. Forged checks passing through clearing-house — Bank's liability — Negligence.

The facts presented in the case of Commercial and Farmers' National Bank v. First National Bank of Baltimore, reported in 30 Md. 11, are, as the court says, "of considerable interest to the public and of importance to the banking institutions;" and by reason of the importance of these questions and the discussion, we feel justified in giving the opinion of the court in full, which opinion states also the facts:

"This case presents questions of considerable interest to the public, and of importance to the banking institutions of

the State. The material and undisputed facts, which must be stated somewhat in detail, are these: On the 20th of December, 1866, about 2 o'clock P. M. an individual, well dressed and of respectable appearance, but a stranger unknown to any of its officers, came to the counter of the receiving teller of the Commercial and Farmers' National Bank, said he wished to open an account, and presented a check on the First National Bank of Baltimore for $4,600 15/100, purporting to be drawn by Horace Abbott, dated the 18th of December, and payable to the order of John S. Hillan. The teller, who knew Mr. Abbott's financial standing to be good, and had seen his checks before, produced the signature book in which the man put the name 'John S. Hillan, No. 504 W. Fayette Street,' and indorsed the check at the counter in that name. The teller then gave him a customer's small bank book, in which the amount of the check was put to his credit as cash; but on the same day the teller was directed by the cashier not to allow the account to be drawn upon until the deposited check was known to be good or was paid. On the morning of the next day, the 21st, this with other checks was sent by the Commercial and Farmers' Bank to the clearing-house, its amount being noted on the lists which were there balanced and settled. From thence it was taken to the First National Bank, where it was passed as genuine by the proper officers of that bank, charged to Mr. Abbott's account, and credited to the Commercial and Farmers' Bank. By the custom and usage of all the banks in the city of Baltimore, proved by all the witnesses, where a check is sent through the clearing-house to the bank on which it is drawn, and is not heard from before eleven o'clock on the day on which it is so sent, the bank sending it has the right to assume it was good or had been paid, and to act accordingly. On the following day, the 22d, after the check had thus been accepted as genuine and paid by the First National Bank, the same person presented himself at the counter of the paying teller of the Commercial and Farmers' Bank with his bank book, and said he wanted to draw some money; a blank check was given him which he filled up for $4,500, payable to self or bearer, and signed the name 'John S. Hillan.' The teller ascertained from the books the amount to his credit, and from the receiving teller his identity with the individual who had previously

made the deposit, compared the signature of the check with that on the signature book, asked him how he wanted the money, and whether he was going to use it in Baltimore, with a view of indorsing the check good, if he wished to use it in the city among the merchants; but the man replied he wanted to take the money to Washington, and the teller then paid him the $4,500 in small notes of fives and tens, making quite a large bundle.

Mr. Abbott was a large customer and depositor of the First National Bank, and was absent from Baltimore, from the 14th to the 22d of December. His account charged with this check was overdrawn by him on Monday the 24th, to the amount of $372 48/100, and the overdrawing continued during the week until Saturday the 29th, when his account was overdrawn $2.297, and after bank hours of that day, he was for the first time informed by the bank officers of such overdrawing. This information led to an immediate examination of his account and checks, when he discovered the check in question, pronounced it a forgery, and stated he never knew such a man as John S. Hillan, and had never drawn such a check. The forgery of his name was very skillfully executed and difficult of detection, and the check itself was in printed form, exactly similar to those used by him from his check book. Notice of the forgery was given by the First National Bank to the Commercial and Farmers' Bank, on Monday the 31st, and re-payment of the money demanded, but the latter denied its liability beyond the $100 15/100 still remaining to Hillan's credit. No such person as John S. Hillan could be discovered or traced.

"The First National Bank having refunded to Abbott, brought this action against the Commercial and Farmers' Bank to recover back the money the former had thus paid on this forged check. The declaration contains the common counts for money paid by the plaintiff for the defendant, at its request; for money received by the defendant for the use of the plaintiff; and also special counts for money paid by the plaintiff to the defendant, at its request, on this forged check.

"It is our first duty to determine what principles of law are to govern the decision of the case upon the conceded facts above stated. In arriving at a just conclusion upon this subject, we are without the aid of any express adjudication of our

own courts, for no case similar in its circumstances has heretofore arisen in this State. The case of the Merchants' Bank v. The Marine Bank, 3 Gill 96, is materially different in that there was there a genuine instrument upon which there was a forged endorsement of the payee's name, whereas here the check is a forgery throughout. We think, however, the legal principles which must guide and control our judgment have been settled by decisions elsewhere of the highest authority.

"In the early case of Price v. Neil, 3 Burr. 1354, where an action of *assumpsit* was brought to recover back from the endorsee and holder, money which had been paid to him by the drawee on two bills of exchange, one of which was paid without acceptance, and the other accepted and then paid, and on both of which it was afterward discovered the drawer's name had been forged, Lord Mansfield, after adverting to the form of action as one in which the plaintiff could not recover the money unless it be against conscience in the defendant to retain it, said: 'But it can never be thought unconscientious in the defendant to retain the money when he has once received it upon a bill of exchange endorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of the forgery. Here was no fraud, no wrong. It was incumbent on the plaintiff to be satisfied that the bill drawn upon him *was the drawer's hand* before he accepted or paid it; but it was not incumbent on the defendant to inquire into it.' The authority of this case so far as it proceeds upon the ground that the drawee is bound to know the handwriting of his correspondent, and as applicable to the case of a bill accepted or paid by the drawee, where the drawer's name has been forged has never been questioned, but has been uniformly and abundantly sustained. It is because the acceptor is bound to this knowledge that in an action against him the handwriting of the drawer need not be proved. The same rule has been extended to bank notes and bank checks and for precisely the same reason. A bank which receives money on deposit, and thence derives profit is justly held to the obligation to know the signatures of its depositors to their checks, and if it pays in mistake a forged check, there is no reason why the loss should be shifted to another innocent party upon whom the law casts no such obligation, and who,

upon the faith of such payment, has parted with his own money or been placed in a worse position than he would have been but for such payment.

"Another instance of the application of the same principle is found in Smith v. Mercer, 6 Taunton, 76. There the acceptance was forged, and the bill paid at maturity to a holder for value, by the bankers of the acceptor where he kept his cash, and where by the forged acceptance it was made payable. The forgery was discovered a week afterward and notice given to the defendant, but it was held that the bankers were not entitled to recover. The strongest instance perhaps of the enforcement of the rule is that of Levy v. Bank of the United States, 1 Binney, 27, and 4 Dallas, 234, where one Thomas, passed to the plaintiff, Levy, a check for $2,600 on the bank, purporting to be drawn by Charles Wharton, in favor of Thomas or bearer. The plaintiff sent his clerk to the bank with the check, and it was received by the teller and entered to Levy's credit in his bank book as cash. A few hours afterward on the same day, it was discovered that Wharton's name had been forged by Thomas, and notice thereof was given to Levy, and yet the loss was thrown upon the bank.

"In every stage of the case which underwent three several arguments in different courts, the decisions were in favor of Levy. The entry in his book as cash was treated as payment of the check by the bank, and upon the authority of Price v. Neal, it was held to be the duty of the bank to know the handwriting of its depositor, and having paid the check to a holder for value, who had no suspicion of the forgery, it must bear the loss.

"In another case (United States Bank v. Bank of Georgia, 10 Wheat. 333), bank notes issued by the Bank of Georgia, which had been fraudulently altered in course of circulation, found their way into the Bank of the United States, and the latter presented them to the former who received them as genuine and placed them to the general account of the latter as cash by way of general deposit. The forgery was discovered nineteen days thereafter, and it was decided by the Supreme Court of the United States the loss must fall on the Bank of Georgia, whether the transaction be regarded as a payment or an acceptance of the notes. Mr. Justice Story,

who delivered the opinion of the court in that case, reviewed all the authorities and held that the receipt by a bank, of forged notes purporting to be its own, must be deemed an adoption of them as it has the means of knowing whether they are genuine or not: 'and in respect to persons equally innocent where one *is bound to know* and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine.'

"In a more recent case (Bank of St. Albans v. Farmers' and Merchants' Bank, 10 Vermont, 141), the same doctrine has been affirmed and enforced by the Supreme Court of Vermont. There, a check upon the Bank of St. Albans in favor of one Wilson, or bearer, was purchased by another bank from the alleged payee, *an entire stranger*, who endorsed it in the name of Wilson, and it was paid on presentment by the bank on which it was drawn. It was subsequently discovered that the name of the maker, who was the president and a customer of the bank, was a forgery, and a like result attended the effort to recover back the money. We may also refer to the case of Bernheimer v. Marshall, 2 Minn. 78, for a very clear and well reasoned decision upon the same subject and to the same effect.

"The facts, as well as the principles of these cases, have been cited with some particularity, because of their close resemblance in many instances to those of the case at bar. In our opinion, the case before us falls within the general doctrines settled by these authorities, and is distinguishable from that class of cases, where forged securities of third persons have been received in payment, as well as from those which have established the rule, that if a party pays money under a mistake of the real facts, and no *laches* are imputable to him, in respect of his omitting to avail himself of the means of knowledge within his power, he may recover it back. Nor is the rule of commercial law, that no title can be acquired through a *forged endorsement*, which was specially relied on by the appellee's counsel in argument, and was the ground upon which the court below proceeded in granting the plain-

tiff's first prayer applicable here. The rule as stated, is no doubt clearly settled, but its very statement shows it can have no bearing on such a case as the present. It presupposes a genuine negotiable instrument, the title to which can be transferred by a valid endorsement; but it is a solecism to say, any title can be acquired to that which has in fact no existence. The endorsee of a check or note to which the maker's name is forged, of course acquires no *title* from an endorsement, and no rights as against any one where the endorsement is made to him directly by the forger or his accomplice, and it matters not in such case what may be the form of the forged instrument, whether payable to order or bearer. It is therefore perfectly immaterial to the rights of the parties to this suit whether the name John S. Hillan, the payee in the check, was a fictitious name inserted by the forger and endorsed thereon by the person who deposited the check with the defendant, or was the genuine name of the criminal thus acting. In neither case could the defendant have derived any title by such endorsement, and in the sense of acquiring title from one capable of transferring the paper, it cannot be pretended the defendant was a *bona fide* holder. The appellant's defence does not rest upon this ground. Its legitimate defence is, that in entire innocence and without suspicion of the forgery, it received in the course of business a forged check on deposit, and sent it through the regular channel of communication, for payment to the plaintiff, on whom it purported to be drawn and upon whom the law cast the duty and obligation of knowing the maker's signature; that the plaintiff adopted it as genuine and actually paid it to the defendant, and after such recognition and payment, and on the faith thereof, the defendant paid over a large part of the money to the same party who had made the deposit. Apart from any other facts or considerations than these, there is in the language of the authorities cited nothing unconscientious in the defendant's retaining the money, and no reason why the loss as between parties thus equally innocent and equally deceived, but where one is bound to know and act upon his knowledge, and the other has no means of knowledge, should be thrown upon the latter in exoneration of the former. The safest rule for the commercial public, as well as that most

consistent with justice, is to allow the loss to remain where by the course of business it has been placed. Nor is the argument sound, that the defendant was placed in no worse position in consequence of the plaintiff's payment of this check, because by receiving and treating it as a deposit *in cash*, it assumed to take the risk of its genuineness as between itself and the depositor, or parties whom he might have induced to advance money, or give him credit upon the faith of the statement in the bank book delivered to him, at the time the deposit was made. How far the defendant might have been estopped from denying its responsibility, to those who might have dealt with the party calling himself Hillan, on the faith of this representation of a deposit to his credit as cash, it is not necessary to inquire. Such a case might depend on a variety of considerations, and will be seasonably decided when it arises. It is sufficient for our present decision to say, that no such question is presented by this record. The payment here was in fact made to the same party who made the deposit, the forger himself or his confederate, and in our judgment it is very clear the defendant had the right as between itself and this party to instruct its officers, notwithstanding the entry to his credit as cash, not to allow the account to be drawn upon, until it was first ascertained that the deposited check was good or had been paid. Having done so and having in fact paid to such party, after the check had been paid by the plaintiff, it is impossible to say the defendant has not been placed in a worse position in consequence of such payment by the plaintiff.

"It follows from these views there was error in granting the plaintiff's first prayer, and for this error the judgment must be reversed. The remaining inquiry is, ought the case to be sent back for a new trial? Upon this question we have already, in a measure, indicated our opinion. It has been the uniform practice of this court to refuse a *procedendo* where it is apparent from the record the plaintiff is not entitled to recover, in view of the law of the case pronounced by the appellate tribunal. What that law in the present case is upon the undisputed facts, we have already determined. The two grounds upon which it is supposed the plaintiff is entitled to recover independently of the law thus announced, are stated in its

second and third prayers, which were rejected by the court below. The first, places the plaintiff's right to recover solely upon the ground that the jury might find, from the evidence, that there was a general and well-established usage of the banks in Baltimore, to the effect that where one bank sends to the clearing house a check on another bank, payable to order and purporting to be indorsed by the payee, the bank sending it guarantees the indorsement of the check to be the genuine indorsement of such payee. We need not stop to inquire whether there is evidence proper to be submitted to the jury of the existence of such usage, because we have shown it was immaterial to the rights of these parties whether the indorsement of Hillan's name was genuine or fictitious, the drawer's name being a forgery. The proposition that the plaintiff could recover in this case upon the basis of such supposed guarantee, assumes that the obligation of knowing the handwriting of Abbott was thrown as much upon the defendant. who had no means of such knowledge, as upon the plaintiff who had the means and who was in law presumed to know his signature, and is in direct conflict with the authorities before cited.

"The second ground proceeds upon the theory that there was a general and well-known usage among the banks in the city of Baltimore, not to receive on deposit a check drawn upon another bank from the alleged payee, unless he is known to some of its officers or is introduced or identified by some person so known, that the party calling himself Hillan, the forger or his confederate, was entirely unknown to the officers of the defendant, and they did not take the precaution of requiring any evidence of identity; that the defendant's cashier, on hearing the fact that the check had been received from a stranger, directed the teller not to permit the party to draw on the deposit until the check had been paid by the plaintiff, and then sent the check through the clearing house in the usual way without notice to the plaintiff of the circumstances under which it was received and held, and it is insisted that if the jury found this usage and these facts in connection with those stated in the first prayer, and that by this negligence of the defendant in so receiving the check and sending it to the clearing house for payment, the forger was enabled to consummate his intended fraud, the plaintiff is entitled to recover.

"In our opinion, the question of negligence as affecting the rights and determining the responsibility of these two banks in this transaction, must stand on grounds entirely independent of the supposed usage not to receive deposits from strangers without identification. The defendant's officers do not admit *knowledge* of any such custom, and aver that no such uniform practice has been adopted by their bank. But the whole object and purpose of this practice in each bank where it prevails, is obviously protection and security for itself and not of other banks with which it has dealings. The defendant had a clear legal right to receive this check on deposit as it did, and if it acted negligently in so doing, or had cashed the check at once instead of receiving it on deposit, it certainly would have incurred the risk of loss to itself, but we cannot perceive how this could help the plaintiff's case or excuse its own negligence in law, or enable it to escape the consequences of its failure to detect the forgery of its customer's name, when the check was presented to it for payment. It certainly would be very unsafe to decide that a bank can be excused for the negligent performance of the duty imposed by law of examining its customer's signature to a check, because the innocent holder happening to be another bank has merely failed in receiving it, to observe a usage or practice adopted for its own security. Their own interests will prompt banks to adopt proper precautions in receiving deposits as well as in paying out money, but something more is required than the mere non-observance of the usage here attempted to be set up, in order to throw the loss in this case upon the defendant in exoneration of the plaintiff. So that at last the question presented resolves itself into this: Can it be said, as matter of law, that the sending of this check through the clearing house and the failure to communicate to the plaintiff the fact that it was received from a stranger, amount to such negligence as will throw the loss upon the defendant, or ought a jury to be permitted, from these facts or any circumstances disclosed in evidence, to infer such negligence and find a verdict for the plaintiff for the full amount claimed.

"It was at one time held in cases where bills, notes, or other securities, transferable by delivery, were lost or stolen, that it was a sufficient defence to an action by the holder for value,

that he had received them under circumstances which ought to have excited the suspicion of a careful and prudent man, but the English decisions following that of Gill v. Cubitt, 3 Barn. & Cress. 466, adopting this doctrine were subsequently overruled, and Lord Denman, in Goodman v. Harvey, 4 Adol. & Ellis, 870, has said: 'I believe that we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of a contrary doctrine. Where the bill has passed to the plaintiff without any proof of *bad faith*, there is no objection to his title.' The weight of American authority is to the same effect. Murray v. Lardner, 2 Wallace, 110.

"We do not mean to adopt this law as applicable in all its bearings to a case like that now before us, or to decide that a case may not arise in which bank officers and agents may, in receiving a check, act in a manner so grossly negligent, even without *mala fides*, or by their conduct so mislead and lull into security the bank called upon to pay, as to excuse its failure to immediately detect the forgery, and where a jury may very properly be allowed to pass upon such conduct and negligence as most essentially facilitating the fraud, and occasioning the loss, and find a verdict accordingly. But in view of the long series of decisions settling the law so as to protect innocent holders for value, a much stronger case must be made out than is presented by this record. There is no pretence of bad faith on the part of the defendant. It received the check in the ordinary course of business and sent it through the usual channel for payment. We cannot sanction so loose a doctrine as to hold that the fact that it came through the clearing house affords any shadow of excuse to the plaintiff. The law attaches no sanctity to this source of communication, and none in fact can be imputed to it. The legal effect of what was done here as in every case of presentment and demand is this: the defendant said to the plaintiff, 'we hold this check on your bank, purporting to be drawn by one of your customers, and demand its payment,' and it can make no difference through what source this demand was made, whether by letter, or by special messenger, or through the clearing house.

"The appearance, acts, and conduct of the party, both when he made the deposit and when he drew out the money fail to exhibit, so far as the proof discloses, anything affording rational grounds of suspicion of the forgery. The direction of the defendant's cashier to its teller imports nothing more than proper precaution on his part to protect his own bank from loss, consequent in his mind from the risk incurred in receiving the check from a stranger. There was nothing, therefore, to be communicated important for the plaintiff to know, unless it be determined that in every case where a check is received from a stranger it is the legal duty of the holder to communicate this fact to the bank on which it is drawn, before or at the time of its presentment and demand for payment, and that the failure to do this is negligence or evidence of negligence affecting his right to retain the money paid upon the check, in case it should afterward be discovered to be a forgery. We are not prepared to lay down so stringent a rule as this. Indeed, it is difficult to perceive of what service this knowledge would have been to the plaintiff, unless we assume it had the means of knowing, not only Mr. Abbott's signature, but was familiar with his business, and knew all the parties with whom he had dealings and to whom it became necessary for him to give checks; and if it had such knowledge the fact to whom this check was given, was as effectually imparted from the face of the paper itself, as it could have been by any written or verbal communication from the defendant. But if it should be held the non-communication of this fact or any circumstances attending the whole transaction was negligence or evidence of negligence in the defendant, what can be said of the conduct of the plaintiff, not only in paying the check, but in retaining it for a week, and in the meantime allowing Abbott's account to be overdrawn, from day to day, to a large amount without notice to him of that fact, so as to lead to a more speedy detection of the crime, the arrest of the forger and recovery of the money which the defendant had paid to him? The chance of discovering the criminal and recovering the money was certainly diminished by each day's delay, and if the negligence of either party, apart from the legal obligation resting upon the plaintiff to know Abbott's signature, can be regarded as most essentially facilitating the fraud, and occasioning the loss, and the liability therefor could be

thereby determined, we should be forced to say the superior negligence was upon the plaintiff.

After a careful and patient examination, both of the law and the facts of the case, we are satisfied there is no ground for a *procedendo*. The case in short in all its features demonstrates the propriety of the rule established by the authorities we have cited. We are fully aware of the importance of so settling and applying the law as not to facilitate the success of frauds, and of the difficulty of detecting the skillful forgeries unfortunately so prevalent in recent times. But the law has fastened the obligation of knowing the signatures of its customers upon the bank which receives their money on deposit, and undertakes to pay it out on their checks. Greater safeguards and precautions must be devised and adopted by banks to ascertain, before payment, the genuineness of checks drawn upon them. The primary obligation and duty are there placed, and in the careful discharge of that duty, and in the just severity of courts in punishing to the extreme limits of the law, the guilty perpetrators of such crimes, the community will find its best security.

"The defendant admits its liability to the extent of the \$100 15/100, still remaining in its hands, and the judgment must be reversed with costs, and judgment rendered by this court in favor of the appellee for that sum only."

§ 353. Rights of drawee bank against payee in endorsing forged check.

The facts presented in the case of National Bank of North America v. Edward D. Bangs and another, 106 Mass. 439, are very interesting and of peculiar importance to bankers. It is conceded that they should all be well informed upon questions affecting their responsibility, especially where the question of liability arises upon their acts or defaults relating to forged instruments which may come into their hands. Therefore having in view the question of responsibility resting upon a banker and the valuable information which may be derived from an important case, we believe it advisable to recite the facts which were agreed upon in the above case and submitted

to the court upon which his opinion was rendered. They are as follows:

"The defendants, on September 21, 1869, took of some person (whom they do not remember, and did not remember when they were first notified of the alleged forgery, and could not then tell whether he was a stranger to them or a person known to them) in good faith and for full value, in payment for gold sold by them in the usual course of their business, a check payable to their order, of which the following is a copy:

"$1,308.63. National Bank of North America.

"Boston, Sept. 21, 1869.

"Pay to the order of E. D. & G. W. Bangs & Co. thirteen hundred and eight dollars and sixty-three cents.

"No. 932. WILLIAM D. BICKFORD."

"On said September 21st, the defendants deposited this check, with others, and with their other moneys, in the Maverick National Bank of Boston, where they kept their deposits; and before depositing it, for the purpose of enabling the Maverick National Bank to collect the check from the National Bank of North America, and in accordance with the usage of depositors of checks payable to order, they indorsed it in blank by writing on the back of it 'E. D. & G. W. Bangs & Co.' The Maverick National Bank the next day presented the check at the clearing-house, when it was allowed and paid to the Maverick National Bank by the National Bank of North America in the usual manner of settling the daily balances of banks at the clearing-house.

"The Maverick National Bank, on the day of deposit, credited the defendants with the amount of the check in its account with them; and the National Bank of North America on September 22d, debited William D. Bickford, in whose name the check purported to have been drawn, and who was a customer of and a depositor in the National Bank of North America, and had funds on deposit there, with the amount of the check. The check was retained by the National Bank of North America until the 1st or 2d of October, 1869, when it was sent with other checks, by the National Bank of North America, to William D. Bickford, with the monthly statement of his ac-

count, according to the usage of banks. Bickford, after examining the checks, pronounced this a forgery, and on the 4th of October informed the bank of it; and on the same day the defendants were notified by the National Bank of North America that the check was forged, which was the first intimation or suspicion they had that the check was forged. For the purposes of the hearing on this statement of facts, it is admitted that the check was a forgery."

The Court in rendering its opinion upon the above agreed statement of facts, says:

"This suit is brought to recover money paid upon a check purporting to be drawn by one Bickford, upon the plaintiff bank, to the order of the defendants, indorsed by them, deposited with their banker, and collected through the clearing-house. The signature of the drawer proved to be a forgery. As the discovery of the forgery was not made in time to enable the plaintiff to return the check, as of absolute right, under the rules of the clearing-house, we think the case must stand as if the payment had been made directly at the plaintiff's counter, in the ordinary mode.

"The right of return, secured by the rules of the clearing-house, is a special provision, in compensation for payment without inspection. Instead thereof, the rules give opportunity for subsequent inspection. When that has been had, the special rules cease to govern; and the rights of the paying bank rest upon the general principles of law."

§ 354. Clearing-house member representing a bank not a member.

Where a bank, which is a member of a clearing-house, enters into an agreement with a bank not a member, to clear for it all the checks of the latter, where the latter has knowledge of the rules of the clearing-house, the agreement is held to be a tripertite agreement between the banks and the association.[9]

[9] O'Brien et al. v. Grant, 146 N. Y. 163; Farmers' and Merchants' Bank of East Birmingham, to use, v. Third Nat. Bank of Pittsburg, Appellant, 165 Pa. St. 500.

§ 355. How clearing-house may sue and be sued.

A clearing-house is not a corporation nor a partnership or an artificial person, but is an association represented by its trustee, and its committee or business managers may sue as trustees to collect upon securities which have been pledged to the clearing-house to secure indebtedness due and owing by member banks, for certificates issued for their benefit, by the clearing-house committee.

The committee hold the securities as trustees. The property is pledged to them as security.[10]

Right of set-off, when may be denied.

A clearing-house committee holding notes for value and as security and which have been placed with it, in a suit to recover thereon, the maker is denied the right of set-off.

The maker has no right to set-off against the note, the amount which his bank owed him as a depositor.[11]

§ 356. General utility of clearing-house and its incidental powers.

The purpose of the clearing-house, as previously stated, is not only to make settlements between the banks who are members of the association, but to give aid to each other in financial stringencies. The clearing-house may be called a financial regulator. In times of financial disturbance and money stringency, the clearing-house associations have demonstrated their usefulness to the country, by issuing clearing-house certificates which, for the time being, met the emergency of the occasion.

During the currency famine of 1893, it was clearly demonstrated that the national banking system was very defective in elastic powers. The failure of this system during such time, is so clearly presented by John DeWitt Warner, in an article prepared by him and published by the Sound Currency Committee of the Reform Club, February 15, 1895, that a large portion of his valuable paper entitled " The Currency Famine

[10] Philler et al. *v.* Patterson, Appellant, 168 Pa. St. 468.

[11] Philler et al. *v.* Jewett & Co., Appellants, 166 Pa. St. 456.

of 1893" is here given space, speaking in reference to the clearing-house certificates and their value as a medium of currency (but not to be used as such) but used to meet the deficiency of the national bank currency, he says:

"Our laws provided but one resource — additional issues of national bank notes. The national banks were urgently summoned to perform their most important legitimate function — that of giving elasticity to a currency admittedly rigid at every other point. The only result was to demonstrate the worthlessness of the National banking system itself.

"We had had it for thirty years. Its original aim had really been, not to provide bank note currency — there was a plethora of that when the national banking system was established — but rather to starve the business public into purchasing government bonds as a condition of being permitted to do business at all.

"So far was it from accommodating itself to the wants of developing communities that it took $11 in funds free for investment in any given locality to secure for that locality $9 in currency. So far was it from expanding to meet the growing demands of the country that, while twenty years ago the then outstanding $340,000,000 of national bank notes represented more than 45 per cent. of all our circulation, ten years later the $347,000,000 of similar notes then outstanding, represented but 28 per cent. of our currency, and in June, 1893 — the latest date at which conditions were normal — the $172,000,000 of national bank notes then in circulation outside of the Treasury were less than 11 per cent. of our currency, of which they had ceased to be a material factor.

"So far was it from being elastic, that we had come to expect a period of stringency in each year — in the late summer and early autumn — which invariably arrived; while a careful survey of the course of our national bank note circulation, showed that the general tendency, at first to its increase and afterward to its withdrawal, had absolutely no connection with present or prospective, however certain, business demands for currency. National banks had long since ceased even pretended obedience to the law, and habitually made discounts in times of stringency in the face of depleted reserves. This practice was possible because the initiative was in the hands

of the banks, and the government had power only to punish; a power which it forebore to exercise.

"In the other particular, however, that of furnishing currency, the initiative was in the hands of the Comptroller. The banks were thus powerless to break the law, no matter how beneficient might have been such violation. And nothing is more instructive than to contemplate the futile writhing and contortions of our national bank-note currency system in the strait-jacket with which it had been pinioned, and to see the note merely inadequate, but positively ludicrous, results of its strenuous efforts to respond to the most urgent demands for relief that this generation has heard.

"The increase of our currency by additions to national bank circulation during the stringency was only about 1½ per cent. and was far less than the amount by which the banks of a single city virtually increased it by clearing-house certificates alone — little more than half the amount by which individual bankers increased it by actually buying gold in Europe and shipping it hither — and was in great part accomplished only after the necessity for it was over, millions of dollars of the additional currency taken out being returned to the treasury with the packages unbroken.

"It was to such a dead fetich that our stricken business appealed when caught in the panic of August, 1893. Never was there offered a more conclusive proof of the self-reliance of our citizens and the superiority of business expedients over government direction. Not merely by financiers in our great cities, and by great corporations experienced in handling such crises but in every part of the country, with the exception of the far southwest, did the people work out their own salvation.

Emergency Currency.

"The experience of August–September, 1893, was unique. There was no gradually developed plans for mutual assistance. Mutual helpfulness there was in plenty between individuals and localities; but it was in prompt response to sudden appeals; and before any general system could be devised, the occasion for it was over. Financial clouds had long been lowering; but it was within a single month that the currency famine

became general, its worst effect was felt, and such relief as was extended aided the crisis over, with a tendency toward a glut of circulating medium.

"In other cases, nations or communities had simply found themselves thrown upon their own resources. Our people found themselves not merely drained of currency, but forbidden by most carefully drawn statutes, to utilize the expedients which would have been most natural and most effective. No civilized nation has ever experienced such a currency famine. None has ever found itself so fettered by positive law in its efforts to rescue itself. None ever so promptly arose to the emergency. Never was there so prompt a return to normal conditions.

"It is this that I have found a peculiarly interesting study. Not that I have been able to estimate or even trace it in anything like full measure. One of its most striking peculiarities was the extent to which — partly on account of the suddenness with which it was called for and the promptness with which the need of it was over — partly, perhaps, because everyone assumed that its use was in defiance of law — the actual practice in each locality was in general, unknown outside of it, and evidence and mention of it hard to secure afterward.

"The specimens I quote are, therefore, but a few score of the hundreds of cases that careful inquiry would reveal; and, except in the case of clearing-house certificates proper, give but a faint idea of the extent to which in all parts of the country this emergency currency sprang into being. They are, however, I trust, sufficiently varied to illustrate the methods used and the more characteristic sorts of currency — as distinguished from more strictly 'credit' expedients — that were thus called into being.

Clearing-House Certificates.

"First come actual clearing-house certificates — new, not in invention, but rather in the novel extent of their use. Their office was simply to extend indefinitely the brief term of mutual credit involved in all clearing-house settlements. Contrary to the general impression, they were not used as cur-

rency: but their effect was to add just their face to the volume of currency in circulation, by releasing, for use outside, that which would otherwise have been reserved for clearing-house settlements. So far as the banks using them transgressed law, it was in renewing loans and extending discounts when their reserves were depleted below the legal limit. The use of clearing-house certificates simply enabled this to be done with less risk of other than legal consequences.

"And to the writer, not the least interesting of the data that he has gathered in this connection, has been the proof — in instance after instance — where he has been proudly assured that a particular city had not been forced to extraordinary expedients such as had been seized upon in their desperation by less favored centers — either that the boaster had been saved by aid extended by those whom he so patronizingly pities, or that the self-sufficient town had already adopted such practices that its ordinary way of doing business left nothing in the way of liberal financiering yet to be exploited. It was to the banks that did use clearing-house certificates in the emergency, that the country owes its escape from unparalleled disaster; and at once to anticipate and answer all inquiries as to the form and use of the legitimate clearing-house certificates, I append, in reduced *fac simile*, copies of specimens from each city where they were used. (See pp. 345 and 346.)

"Denominations were as follows: New York, $20,000, $10,000 and $5,000; Philadelphia, $5,000 only; Boston, $10,000 and $5,000; New Orleans, $500 to $10,000; Baltimore, $6,000, $3,000 and $1,000; Pittsburgh, $10,000, $5,000 and $1,000; Detroit $5,000 only; Buffalo, $5,000 and $1,000. Their issue, it will be noticed, was mainly in the Northeast, New Orleans being the only Southern and Detroit the most Western example. And in each case it will be observed that use of the certificate is limited strictly to settlement of mutual accounts between members of the clearing-house association in question."

We shall not attempt to give in reduced *fac simile*, copies or specimens of all the clearing-house certificates referred to by

Mr. Warner, but will present a copy as used by the clearing-house association of New York:

No. ...... $20,000.

LOAN COMMITTEE OF THE NEW YORK CLEARING-HOUSE ASSOCIATION.

New York ...., 1893.

TWENTY THOUSAND DOLLARS.

THIS CERTIFICATE, that the .... has deposited with this Committee, securities in accordance with the proceedings of a Meeting of the Association, held June 15th, 1893, upon which this Certificate is issued. This Certificate for the sum of TWENTY THOUSAND DOLLARS, from any will be received in payment of balances at the Clearing-house Member of the Clearing-House Association.

On the surrender of this certificate by the depositing bank above named, the Committee will endorse the amount as a payment on the obligation of said Bank, held by them, and surrender a proportionate share of the collateral securities held therefor.

$20,000.

....
....
....
....
....
....

Committee.

Other devices in similar character to the clearing-house certificate, were used during the currency famine of 1893, such as certified checks, pay checks, due-bills, etc.

It is conclusive from the facts presented by Mr. De Witt Warner, that the National banking system, during a severe money stringency, is not clothed with the power to provide in such emergencies, the necessary circulation, its elastic power, such as it possesses, is frequently withdrawn. By the use of conservative language, it may be said that the system at such times is powerless to meet the emergency. Therefore, the clearing-house under its implied power, it has been found, may provide for and issue clearing-house certificates.

They do not circulate as money, but the effect is practically the same. They add to the volume of currency, to the sum or amount which, in their absence, would be required in cash to make the settlements between clearing-house banks.

While the purpose of the clearing-house, as stated, was not originally organized or intended to be put to such use through its implied or incidental power, in the issuing by it of such certificates, however, by the use of such means, the currency is expanded to aid the circulating medium required by the country in extreme financial depressions.

The issuing of such certificates are recognized as clearly within the law. They are intended to be used only as instruments for settlement of balances between banks that are members of the clearing-house.

The issue and circulation of the instrument is limited between the parties. They are not intended to circulate as money, and therefore, as previously stated, cannot be construed to be in violation of the constitution relating to the issuing of instruments as bills of credit and intended to circulate as money.

In a review of the usefulness and powers of the clearing-house, it is found to be a great convenience to banks in making settlements between them.

It may also receive from a member bank, securities; and upon such securities make advancements to aid it during times of depression.

As an organization through its committee, it may enforce collection upon such securities where they have passed into the clearing-house for value, and the debtor as against the bank depositing the same, has no right of set-off.

It may also issue clearing-house certificates as settlements for balances found to be due between its members, and they may be used between the bank as a payment in the place of cash.

Banks as organizations may greatly enlarge their usefulness to each other and the public in general by urging all banking associations, where conveniently located, to become members, and as such, report their condition monthly to the clearing-house committee.

CHAPTER XLVII.

TRUST COMPANIES.

§ 357. Distinguished from a bank.

The powers of a trust company are those which are conferred upon it by the statute.

The extent of its powers in business and acts are such only as are specifically granted to it and authorized by the law. It may, when authorized, do the things authorized by its charter; but it has no incidental or implied authority to transact other business.

It is a trustee and is bound by law to the exercise and performance only of such acts as are delegated to it by the expressed and necessarily implied provisions of the law.

It differs from a bank in this, that its deposits are loans to it or trust funds held in trust, and are not subject to check. It has no power to issue its notes for circulation. It cannot deal in exchange, make discounts, issue letters of credit, drafts, or certificates of deposit.

It may receive moneys in trust, and when so received, it must preserve them as trust funds. It may hold the same and accumulate the same at an agreed rate of interest; and may accept and execute all trusts committed to it by persons, corporations, and courts of record; and receive title to real estate or personal estates on trust, which may be created according to the laws of the State; and may also act as agent for corporations in holding, issuing, registering, and transferring stocks and bonds; but its functions and powers are not banks in the strict commercial sense of that word.[1]

§ 358. Trust companies may have banking powers.

The constitution and laws of the State govern and control this privilege, and where banking privileges are not expressly granted, the business of banking by a trust company cannot be exercised. Many of the States by special provisions of law

[1] Mercantile Bank v. New York, 121 U. S. 138.

have enacted statutes authorizing this privilege, granting to a trust company, in connection with its powers as such, the right to conduct a banking business. But this power must be expressly authorized by the statute, if not, the power does not exist by implication. Where an act of the Legislature authorizes the creation of a trust company, and by its provisions confines its powers to be those of executing trusts, and does not in the act authorize a banking business, it has no power to perform such business under an implied authority of law.

The principle of law governing a trustee who accepts a trust, will not permit the trustee to speculate with the trust property; or to retain the profits made by the use of the same. A trustee is compelled by law to account for and pay over to the *cestui que trust* all profits made by the use of any trust property.

The doctrine is also settled that a trustee cannot become a purchaser at his own sale without special permission or authority given by a court of competent jurisdiction.[2]

A purchase by a trustee of property for his own benefit is not absolutely void but voidable; and may be confirmed by the parties interested, either directly or by long acquiescence.[3]

It will be seen that the business of banking and that of a trust company are governed and controlled upon almost directly opposite principles of law. A banker may make profit out of money received upon an open account, and may also buy property at his own sale. He may also issue drafts, certificates of deposit, letters of credit, and discount notes. Where funds are deposited in a commercial bank upon an open account, the bank at once becomes a debtor for the same. While the deposit of funds in a trust company cannot be intermingled with other funds and must be held in trust, neither can they be used for profit, except as may be expressly agreed upon between the parties and as authorized by law.

Where the statute permits a trust company to do a banking business, a provision of law should always be enacted, requiring that a separate set of books should be kept; and no intermingling of the commercial and trust funds should be permitted. The principle of combination or dual authority, allowing a trust

2 Allen *v.* Gillette, 127 U. S. 589.

3 Hammond *v.* Hopkins, 143 U. S 224.

company to do a banking business, is inconsistent and as previously stated should not be permitted unless expressly authorized by law.

The question of authority under the constitution and statute, of a trust company organized under the laws of the State of Missouri to do a banking business, is ably and profoundly discussed in the case of State *ex. inf.* v. Lincoln Trust Co., 144 Mo. 562.

In this case the Lincoln Trust Company was duly incorporated under the acts of the Legislature enacted in 1889 and amendments thereto passed in 1891.

The company claimed the authority under its charter and incidentally under the laws enacted to conduct a banking business in connection with its trust business, and at the time of bringing the action by the Attorney-General in behalf of the people, it was conducting in addition to a trust business a banking business.

The case is a very important one, as it involves the construction of the powers under the act creating and authorizing trust companies; and also distinguishes the business of banking from that exercised by trust companies.

The general rule as announced by the Supreme Court of the United States, in the case of Thomas v. Railroad, 101 U. S. 71, is as follows: "The powers of corporations, organized under legislative statutes, are such and such only as those statutes confer. Concerning the rule applicable to all statutes, that which is fairly implied is as much granted, as what is expressed, *it remains that the character of a corporation is the measure of its power, and that the enumeration of these powers excludes all others.*"[4]

It is held in the case of State *ex. inf.* v. Lincoln Trust Company, where the statute permitted trust companies to receive money on deposit, and allow interest on the same, that the money might be returned or paid upon check issued; but that the company could go no further, it must confine its privileges to the language of the statute which permitted such companies to receive money on deposit and pay interest on the same.

In the case of Mercantile Bank v. New York, 121 U. S. 138, the court in determining the question of taxation had occasion

[4] Coolidge *v.* Williams, 4 Mass. 140.

to say after enumerating the powers conferred upon trust companies by the Legislature of that State that, "It is evident from this enumeration of powers that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchange of commerce."

The powers granted by the statute authorizes trust companies to receive moneys on trust, but does not authorize them to conduct a banking business, to make loans on personal notes, or to discount or purchase negotiable paper.[5]

Rule determining authority or power.

To determine whether trust companies have banking powers reference must be had to the charter of the company; if incorporated under a special act, and if such act does not authorize the conducting of a banking business, the charter cannot confer such a power, though it is set out and grafted therein. The statute is the measure of authority.

Where there is no special statute empowering and authorizing the formation of trust companies, such corporations may be formed and organized under the general incorporation laws of the State; and may conduct any lawful business permitted by law; but where there is a special act of the Legislature, authorizing the formation of trust companies, the incorporation must be formed under and controlled by its provisions.

In the absence of authority in the act authorizing the business of banking in connection with its business of executing trusts, the law, as previously stated, does not imply such authority.

5 Jenkins v. Neff, 186 U. S. 230.

CHAPTER XLVIII.

INSPECTION AND EXAMINATION OF BANKS.

§ 359. Checking up a bank.

Section 5240, Revised Statutes of the United States, provide that the Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint suitable persons to make examination of the affairs of all the national banking associations located within the States and Territories.

The Act of February 19th, 1875, provides the compensation of the examiners.

State banks organized or doing business in a State are usually placed under the supervision of a commission designated as, "Bank Commissioners," who are appointed by the Governor and confirmed by the Senate.

A Comptroller of the Currency, in discussing the usefulness of this office, says, "Perhaps no one thing has done more to promote the safety and sound management of national banks than their liability to examination, without previous notice, by an agent appointed for that purpose, and probably no provision of the law was more unpopular among the banks when the law first went into effect; but the good results brought about directly and indirectly by such examinations have fully vindicated the wisdom of the provision."

The position and office of Bank Examiner is one of great value and responsibility. Criticisms are frequently heard and expressed that bank examinations are of no value, that the commission is an unnecessary expense placed upon banks and that the good derived from the examination does not justify the cost.

It is true that the experience with the adopted system of examination has been unfortunate in many cases. But the great good performed by the examination is seldom given to the general public.

The reason that examinations are regarded as formal and worthless, arises from the fact that where a bank fails the public generally overlook the fact that the failure was brought about by acts which could neither be detected by an expert, or

prevented by an officer of the law, or the prohibition of the law itself.

The largest and most dangerous failures are those produced by the bank's officers falsifying the books and robbing the "tills." These conditions or acts usually occur during the interim of examinations, and therefore could not be detected.

The difficulty is that examinations are made too hurriedly, and the work which the law requires to be done within a given time, compels the examiner to rapid efforts, and some seemingly small matter may be overlooked which, if sufficient time was allowed, could and would have been detected and a great failure averted.

The value of an examination made by a person that has no knowledge of local conditions cannot be wholly relied upon. An examination being made by a stranger who cannot be familiar with the business paper of the place, does not make discounts and assets good which are worthless.

The inspection should be thorough and should amount to an auditing of the entire business of the bank. This would require the appointment of expert accountants. The examinations also should be more frequent and could be more successfully performed if the examiner had full power to call in the board of directors, requiring them to remain in session while the examination was in progress. The directors, if required to be present, could verify the authority for making and discounting loans and be called upon to report upon each transaction, loan, or discount, and its value as a resource of the bank.

To make a thorough and complete examination of the condition and all the affairs of the bank, the examiner should enter the bank either immediately after the close of business for the day, or at such an hour before commencement of the business of the day, as would permit him to take possession of the entire assets of the bank. The first thing to be done is to place the officers or officer in charge of and managing the bank under oath, requiring them to truly answer all questions that may be put to them by the commissioner or commissioners, concerning the affairs of the bank, the character and value of its assets, and amount of its liabilities, neither misrepresenting nor concealing anything relative to the true conditon of the bank.

The cash in the hands of the teller or tellers should then be immediately counted, the amount found to be in the hands of each one should be noted as cash in the hands of first, second, and third paying or receiving teller, etc., and at the same time an itemized list of all cash items held by them should be separately taken and carefully examined, as these form a part of and (if solvent) are added to and counted as cash.

Cash items, checks, including clearing-house certificates, in the hands of the tellers having been taken, separately listed, and carefully compared with the ledger statement, each item having been found to be regular, these added to the tellers' cash, together with the cash in the hands of the cashier or cash in the vault, which has been counted, make up the total cash on hand and as shown per general ledger.

If one examiner is making the examination, the bills receivable, together with the stocks and bonds, are immediately after counting of cash taken into his possession, and are placed under seal of the commissioner until such a time, as he may be able to list every piece of paper and loan held by the bank.

The commissioner may then take a skeleton proof from the general ledger of all resources and liabilities and the subsequent examinations can be based upon this statement, taken item by item.

The assets may then be examined and proved as they appear upon the skeleton statement. The real estate owned by the bank taken for debt, including that used as bank premises, should be listed. Title abstract should accompany each piece of property, and these will show the cost of the same, and date when taken by the bank, and if carried above its value the excess should be charged off. The stocks, bonds, and warrants, are also listed. This should be done so the examiner may determine whether the bank, if it is a savings bank, has violated the law in owning or holding securities which are prohibited by law.

The loans usually are the most important part of the assets of the bank, and a full and complete list should be taken, together with a list of indorsers and collaterals. Each piece of paper should receive the personal examination of the commissioner, and during the investigation and listing one or more of the officials of the bank, who have a personal knowledge of the

genuineness, and value of the same, should be present that the commissioner may have such facts verified.

There are many instances of extensive frauds which have been committed, by means of loans that were never authorized by the board of directors, and during the process of listing the notes, questions directed to the officer as to their genuineness — the unauthorized or forged loans may be brought to light.

The examiner cannot detect forged paper where the same appears to be regular upon its face, but he can do his duty by placing the officer in charge of the same, and who had authority in the first instance to accept or make loans, upon oath as to their value and genuineness. By listing the loans and discounts, the examiner can ascertain the amount borrowed by the officers and directors, and for which they are personally liable. From the list it can also be ascertained whether or not the bank (if a savings bank) has complied with the law in making its investments in securities authorized by law.

The stocks, bonds, and warrants when listed, their character, value, and genuineness should be determined. National banks are prohibited by law from purchasing, and holding as an investment stocks of other corporations; likewise savings banks are prohibited by law, from investing in certain stocks and bonds.

Overdrafts as a resource are a dangerous class of loans. The authority for their creation may also be a question, which the examiner should carefully investigate; for example, where a firm or corporation doing business with a bank, overdraws its account, the examiner should in every instance ascertain the authority for creating the same. All overdrafts should be listed; the date of the overdrafts and the amounts drawn; and the person creating the same should be called into the bank to verify the correctness of the account, and be required to secure the bank against the sums so drawn, as overdrafts are unlawful, unless granted upon collateral security deposited with the bank.

Resources, due from banks, are assets that may be accurately verified and proved by writing, or wiring, correspondents; stating the balance shown to be due from them on a certain day, and requesting a verification.

When all of the bank's assets have been listed, proven, and verified, with the books, and the sum total of their value is

fixed and determined by the examiner, the bank's liabilities are to be checked and proven.

The liabilities consist first, of capital stock, which can be proven by listing the stock issued, taking the certificate book and checking from it (the stub) the number of the certificate, name of party to whom issued, together with the number of shares, and the amount paid on each share.

The deposits, or the amount due depositors, can only be proven accurately by balancing and checking up each individual account, and proving the same with the ledger. This practice is not followed; and the ledger account showing a total of deposits due, is usually accepted as correct. Quite frequently the examiner will call in a number of pass books, and balance them, verifying the accuracy of the ledger to that extent; but farther than this the examiner seldom extends this branch of the examination. Certificates of deposit can be proven in several ways; but the one usually followed is to list by number all outstanding certificates, showing the amount due upon each certificate, checking back from the ledger and certificate book all paid certificates previously issued by the bank.

Due banks, as a liability, consists of all moneys borrowed and received from all sources. Liabilities of this nature can only be proven correctly by wiring for a verification of the account.

Notes and bills rediscounted, are under the national banking rules held to be liabilities. They are, however, not construed by the Federal courts as immediate liabilities of the bank, as they may never ripen into a debt, and rediscounts are classed as notes or bills sold. They are, however, listed as a liability, and are required to be reported by the Comptroller of the Currency in all reports made to him.

Bills payable represent money borrowed by the bank. Such liabilities should receive a careful investigation, in order to determine the authority for, and the necessity for, borrowing money. This authority should emanate from the board of directors, money borrowed by the president, or cashier, of the bank, unless authorized, is unlawful.

Dividends unpaid are a liability of the bank until distributed, unless they have been unlawfully declared. A dividend cannot be declared only from the profits arising out of the business, and after all the expenses and other requirements of the law

have been first complied with. A dividend cannot be declared out of the capital stock, and if upon an examination of the bank, it is found that the capital stock is impaired, no dividend can be declared until it has been made whole.

Surplus fund. Where the law requires that a certain portion of the earnings of the bank shall at stated periods be carried to a surplus fund, a dividend cannot be declared from the earnings until this has been done.

Undivided profits are all of the net earnings of the bank, which may be declared as a dividend, and then distributed to the stockholders.

When all of the liabilities have been discovered, and listed, in order to determine the condition of the bank, the question of determining its solvency or insolvency is one which is reduced to the sound judgment of the examiner. He must pass upon many important matters. The main question to be determined, is seemingly simple, in its statement; but more difficult and complicated when a report is to be made which must show the bank's actual contition. If the assets as scheduled, and shewn by the books of the bank, are solvent, and the balance is found to be equal to all of the liabilities no doubt can exist, but frequently the assets are sealed down until it becomes a question of serious import to the examiner, and when such a close crisis is reached, it becomes a matter of opinion, and experts and persons of extremely sound judgment may then differ. But it is always best if error is made, to make it rather in favor of the creditors of a bank, and if a bank's solvency hangs in the balance, the judgment of the commissioner, rather than that of the officers of the bank should prevail.

§ 360. Reports required of banks.

The law authorizing and governing national banks requiring reports, is set out in the Revised Statutes of the United States as provided by section 5211, which requires that, "Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the

directors. Each report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the associations at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition."

And section 5212 requires, that every such association shall within ten days after declaring a dividend, the amount of the same, and the amount of the net earnings in excess of the same, shall be reported to the Comptroller of the Currency. These reports must be attested by the president or cashier of the association.

Section 5213 provides, that for a failure to make reports as called for by sections 5211 and 5212, such associations shall be liable to a penalty of one hundred dollars for each day after such period. When a call is made by the Comptroller of the Currency for a report; a form printed by the Comptroller is usually furnished, if not, an application should be immediately made to him for such printed form, as all written forms used will be rejected.

When the report is completed it must be signed and sworn to by the president or cashier, and attested as correct by not less than three of the directors of the bank, and when so completed, it must be forwarded to the Comptroller. The report forwarded, or an exact copy thereof, must be published as required by law, and proof of publication forwarded to the Comptroller.

In addition to the reports above mentioned section 5210 of the statute requires that "The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the

shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

There is no uniform law of the States requiring State banks to make and publish reports, but the value of such a law, requiring such reports can not be overestimated.

The form and plan adopted by the United States, which is required to be made by national banks, is very complete, and every State in the Union should have enacted a law requiring reports to be made and published.

The verification of the report should be made by the board of directors, or a majority of them, and attested by the president or cashier. By the adoption of this rule the directors would be required to expert the affairs of the bank, and not rely upon the examination and report made by the officers. Such a law would insure the examination of the bank by the board of directors, and would compel them, under penalty, to perform a duty which is impliedly their duty to perform by virtue of their office.

The reports should be called by the bank commissioners, or authority in control of the banks, as to the condition of the banks at the close of business on some date prior to the date of the call. There should be not less than six calls during the period of one year. It has been found that through the system of frequent calls, the banks which are required by law to exhibit the full amount of reserve can not so easily violate this provision.

Monthly reports have been recommended by some authorities, but the necessity of such frequent reports does not seem to be apparent, except between banks having mutual accounts, or clearing-house banks, which are required by the rules in most cities, to make weekly reports which are furnished for the benefit of the members.

§ 361. Suggestions to examiners.

The examinations made of banks fail in many instances to disclose the real conditions existing and avert failures. The best accountants and experts are frequently deceived, as the record of failures which occur fully demonstrate.

It is a lamentable fact, that the most serious failures are those caused directly by the officers who preside over, and have the management of the bank's affairs. These failures occur, as a rule, in banks where the board of directors are mere "dummies," and where they have grossly neglected to perform their duties.

The most notable bank failures may be traced to one or two causes; the principal cause is the result of illegitimate use of the bank's funds, taken by some officer of the bank and used in speculation. This is the rock upon which has been wrecked many of the strongest banking institutions, and bank examiners should be able to discern and observe the danger signals. They can be discovered by a careful investigation into the personal habits and business enterprises engaged in by the officers and employees of the bank.

It should be an important part of the duties which are imposed upon the examiner to quietly and judiciously make investigations along this line. If upon a thorough examination into the life, and habits, or business, of an officer in charge of and handling the funds of the bank, the examiner becomes satisfied that the bank is endangered, being in possession of the facts, he should call a meeting of the board of directors and disclose to them his information, together with the possibility of danger. When this duty is performed, it then becomes the personal duty of the board of directors to make a full and complete investigation of all the facts presented to them, and if they find that the bank's property or the funds and deposits belonging to others, are being endangered by and through the business acts or personal habits of any of the bank's officers or employees, it becomes their duty (being in possession of such knowledge) to take action at once to protect the bank from the possible occurrence of loss and damage to the bank; failing to do this and loss occurring, which by their action could have been prevented, they themselves become personally liable.

APPENDIX.

The National Banking Act as Amended, with Other Laws Relating to National Banks.

[Note.— The following are the acts relating to national banks.]

THE CURRENCY BUREAU.

1. The national-bank act.
2. Comptroller of the Currency.
3. His appointment, term, and salary.
4. His qualification.
5. Deputy Comptroller.
6. Interest in national banks prohibited.
7. Office clerks.
8. Seal of office.
9. Offices, vaults, etc.
10. Annual report.
11. When report is printed.
12. Number of copies to be printed.

1. The National-Bank Act.— Sec. 1 of the act of June 20, 1874, provides that the act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, eighteen hundred and sixty-four, shall hereafter be known as the "National-Bank Act."

2. Comptroller of the Currency. (Sec. 324.) There shall be in the Department of the Treasury a Bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United State bonds, the chief officer of which Bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury.

3. Appointment, Term, and Salary. (Sec. 325.) The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years, unless sooner removed by the President, upon reasons to be communicated by him to the Senate; and he shall be entitled to a salary of five thousand dollars a year.

4. HIS QUALIFICATION. (SEC. 326.) The Comptroller of the Currency shall, within fifteen days from the time of notice of his appointment, take and subscribe the oath of office; and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office.

5. DEPUTY COMPTROLLER. (SEC. 327.) There shall be in the Bureau of the Comptroller of the Currency a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand eight hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the Constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars.

6. INTEREST IN NATIONAL BANKS PROHIBITED. (SEC. 329.) It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States.

7. OFFICE CLERKS. (SEC. 328.) The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the Comptroller shall direct.

8. SEAL OF OFFICE. (SEC. 330.) The seal devised by the Comptroller of the Currency for his office, and approved by the Secretary of the Treasury, shall continue to be the seal of office of the Comptroller, and may be renewed when necessary. A description of the seal, with an impression thereof, and a certificate of approval of the Secretary of the Treasury, shall be filed in the office of the Secretary of State.

9. OFFICES, VAULTS, ETC. (SEC. 331.) There shall be assigned, from time to time, to the Comptroller of the Currency, by the Secretary of the Treasury, suitable rooms in the Treasury building for conducting the business of the Currency Bureau, containing safe and secure fireproof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily

in the possession of engravers or printers, and other valuable things belonging to his department; and the Comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the business of his office.

10. ANNUAL REPORT. (SEC. 333.) The Comptroller of the Currency shall make an annual report to Congress, at the commencement of its session, exhibiting—

First. *Condition of national banks.*—A summary of the state and condition of every association from which reports have been received the preceding year, at the several dates to which such reports refer, with an abstract of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to such associations as in his judgment may be useful.

Second. *Closed banks.*—A statement of the associations whose business has been closed during the year, with the amount of their circulatinn redeemed and the amount outstanding.

Third. *Amendments proposed.*—Any amendment to the laws relative to banking by which the system may be improved and the security of the holders of its notes and other creditors may be increased.

Fourth. *Condition of other banks.*—A statement exhibiting under appropriate heads the resources and liabilities and condition of the banks, banking companies, and savings banks organized under the laws of the several States and Territories, such information to be obtained by the Comptroller from the reports made by such banks, banking companies, and savings banks to the legislatures or officers of the different States and Territories, and, where such reports can not be obtained, the deficiency to be supplied from such other authentic sources as may be available.

Fifth. *Employés and expenses.*— The names and compensation of the clerks employed by him, and the whole amount of the expenses of the banking department during the year.

11. WHEN ANNUAL REPORT IS PRINTED. (SEC. 3811.) When the Annual Report of the Comptroller of the Currency

upon the national banks and banks under State and Territorial laws is completed, or while it is in process of completion, if thereby the business may be sooner dispatched, the work of printing shall be commenced, under the superintendence of the Secretary, and the whole shall be printed and ready for delivery on or before the first day of December next after the close of the year to which the report relates.

12. NUMBER OF COPIES TO BE PRINTED.— The act of January 12, 1895, provides that there shall be printed of the Annual Report of the Comptroller of the Currency ten thousand copies; one thousand for the Senate, two thousand for the House, and seven thousand for distribution by the Comptroller of the Currency.

ORGANIZATION AND POWERS OF NATIONAL BANKS.

13. ARTICLES OF ASSOCIATION. (SEC. 5133.) Associations for carrying on the business of banking under this Title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions,

not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

14. ORGANIZATION CERTIFICATE. (SEC. 5134.) The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state—

First. *Title.*—The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second. *Location.*— The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village.

Third. *Capital stock.*— The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. *Shareholders.*— The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. *Object of certificate.*— The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title.

15. EXECUTION OF ORGANIZATION CERTIFICATE. (SEC. 5135.) The organization certificate shall be acknowledged before a judge of some court of record or notary public, and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

16. CORPORATE POWERS. (SEC. 5136.) Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. *Seal.*— To adopt and use a corporate seal.

Second. *Term of existence.*— To have succession for the

period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. *Contracts.*— To make contracts.

Fourth. *Suits.*— To sue and be sued, complain and defend, in any court of law and [or] equity, as fully as natural persons.

Fifth. *Officers.*— To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. *By-laws.*— To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. *Incidental powers.*— To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title; but no association shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the Comptroller of the Currency to commence the business of banking.

17. AMOUNT OF CAPITAL STOCK REQUIRED. (SEC. 5138, as amended by act of March 14, 1900.) No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with

the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars.

18. SHARES OF STOCK. (SEC. 5139.) The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares.

19. PAYMENT OF CAPITAL STOCK. (SEC. 5140.) At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

20. ENFORCING PAYMENT OF CAPITAL. (SEC. 5141.) Whenever any shareholder, or his assignee, fail to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association,

and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association.

21. RESTORATION OF CAPITAL. (SEC. 5141.) If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

22. EXAMINATION OF ORGANIZATION PROCEEDINGS. (SEC. 5168.) Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking.

23. CERTIFICATE OF OFFICERS AND DIRECTORS. (SEC. 5168.) And shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

24. DEPOSIT OF UNITED STATES BONDS. (SEC. 5159.) Every association, after having complied with the provisions of this Title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasurer of the United States, as security for its circulating notes, any United States registered bonds bearing inter-

est, to an amount where the capital is one hundred and fifty thousand dollars or less, of not less than one-fourth of the capital, and fifty thousand dollars where the capital is in excess of one hundred and fifty thousand dollars. (NOTE.—As amended by sec. 8 of the act of July 12, 1882.)

25. COMPTROLLER'S CERTIFICATE OF AUTHORITY. (SEC. 5169.) If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such assocation is authorized to commence such business. But the Comptroller may withold from an association his certificate authorizing the commencement of business whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this title.

26. PUBLICATION OF CERTIFICATE OF AUTHORITY. (SEC. 5170.) The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto.

27. NUMBER AND ELECTION OF DIRECTORS. (SEC. 5145.) The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking, and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.

28. QUALIFICATIONS OF DIRECTORS. (SEC. 5146.) Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

29. QUALIFICATIONS OF DIRECTORS IN OKLAHOMA.— Sec. 17 of the act of May 2, 1890, provides "that the provisions of Title sixty-two of the Revised Statutes of the United States relating to national banks, and all amendments thereto, shall have the same force and effect in the Territory of Oklahoma as elsewhere in the United States :

"*Provided,* That persons otherwise qualified to act as directors shall not be required to have resided in said Territory for more than three months immediately preceding their election as such."

30. QUALIFICATIONS OF VOTERS AT ELECTIONS. (SEC. 5144.) In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

31. OATHS OF DIRECTORS. (SEC. 5147.) Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothe-

cated or in any way pledged as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office.

32. FAILURE TO HOLD ANNUAL ELECTION. (SEC. 5149.) If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two-thirds of the shares may do so.

33. VACANCIES IN BOARD OF DIRECTORS. (SEC. 5148.) Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

34. PRESIDENT SHALL BE A DIRECTOR. (SEC. 5150.) One of the directors, to be chosen by the board, shall be the president of the board.

35. ORGANIZATION OF GOLD BANKS. (SEC. 5185.) Associations may be organized in the manner prescribed by this Title for the purpose of issuing notes payable in gold.

36. CONVERSION OF GOLD BANKS.— The act of February 14, 1880, provides that any national gold bank organized under the provisions of the laws of the United States may, in the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the Revised Statutes of the United States, for the conversion of banks incorporated under the laws of any State, cease to be a gold bank and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall

be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations: *Provided*, That all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank.

37. CONVERSION OF STATE BANKS. (SEC. 5154.) Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this Title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this Title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this Title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations, originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this Title.

38. CAPITAL OF STATE BANKS. (SEC. 3410.) The capital of any State bank or banking association which has ceased or shall cease to exist, or which has been or shall be converted into a national bank, shall be assumed to be the capital as it existed immediately before such bank ceased to exist or was converted as aforesaid.

39. CONVERTED BANKS MAY RETAIN BRANCHES. (SEC. 5155.) It shall be lawful for any bank or banking association, organized under State laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws and to retain and keep in operation its branches, or such one or more of them as it may elect to retain, the amount of the circulation redeemable at the mother bank and each branch to be regulated by the amount of capital assigned to and used by each.

40. PERSONAL LIABILITY OF SHAREHOLDERS. (SEC. 5151.) The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except that shareholders of any banking association now existing under State laws having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this Title.

41. EXCEPTION FOR TRUSTEES, ETC. (SEC. 5152.) Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stock-

holders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name.

42. AMENDMENT OF ARTICLES RESTRICTED.—Sec. 5139 provides that no change shall be made in the articles of association of a national bank by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

43. INCREASE OF CAPITAL STOCK. (SEC. 5142.) Any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency. Sec. 1 of the act of May 1, 1886, provides that any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided.

44. WHEN INCREASE BECOMES VALID. (SEC. 5142.) And no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

45. REDUCTION OF CAPITAL STOCK. (SEC. 5143.) Any association formed under this Title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this Title to authorize the formation of associations, but no such reduction shall be allowable which will reduce the capital of the as-

sociation below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained.

46. CHANGE OF TITLE AND LOCATION.— Secs. 2, 3, and 4 of the act of May 1, 1886, provide:

SEC. 2. That any national banking association may change its name or the place where its operations of discount and deposit are to be carried on to any other place within the same State, not more than thirty miles distant, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association. A duly authenticated notice of the vote and of the new name or location selected shall be sent to the office of the Comptroller of the Currency, but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same.

SEC. 3. That all debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name.

SEC. 4. That nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested.

47. STATUS OF NATIONAL BANKS ORGANIZED UNDER THE ACT OF FEBRUARY 25, 1863. (SEC. 5156.) That nothing in this Title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any national banking association under the act of February twenty-five, eighteen hundred and sixty-three; but all associations which on the third day of June, eighteen hundred and sixty-four, were organized or commenced to be organized under that act shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this Title, notwithstanding all the steps prescribed by this Title for the organization of associations were not pursued, if such associations were duly organized under that act.

BANK CIRCULATION.

48. UNITED STATES BONDS DEFINED. (SEC. 5158.) The term "United States bonds," as used throughout this chapter, shall be construed to mean registered bonds of the United States.

49. (SEC. 5159 as amended by section 8, act of July 12, 1882.) Every association, after having complied with the provisions of this Title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasurer of the United States any United States registered bonds, bearing interest, to an amount not less than one-fourth of the capital, the capital being $150,000 or less, as security for their circulating notes. Such bonds shall be received by the Treasurer upon deposit and shall be by him safely kept in his office until they shall be otherwise disposed of in pursuance of the provisions of this Title.

Section 4, act of June 20, 1874, provides in part that the amount of bonds on deposit for circulation shall not be reduced below $50,000. This determines the amount of bonds required to be deposited by banks organizing with capital stock of over $150,000.

(See sec. 5159 of the United States Revised Statutes; sec. 4, act of June 20, 1874; sec. 8, act of July 12, 1882, and act of March 14, 1900, as to relation of bond deposit to capital.)

50. RELATION OF BOND DEPOSIT TO CAPITAL. (SEC. 5160.) The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount required by law. And any association that may desire to reduce its capital or close up its business and dissolve its organization may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond the amount required by law, and upon which no circulating notes have been delivered.

51. EXCHANGE OF BONDS. (SEC. 5161.) To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run.

52. BONDS HELD BY TREASURER. (SEC. 5162.) All transfers of United States bonds made by any association under the provisions of this title shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency.

53. RECORD OF BOND TRANSFERS. (SEC. 5163.) The Comptroller of the Currency shall keep in his office a book in which he shall cause to be entered, immediately upon countersigning it, every transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, presented for his signature. He shall state in such entry the name of the asso-

ciation from whose account the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred.

54. NOTICE OF TRANSFER. (SEC. 5164.) The Comptroller of the Currency, shall, immediately upon countersigning and entering any transfer or assignment by the Treasurer of any bonds belonging to a national banking association, advise by mail the association from whose accounts the transfer is made of the kind and numerical designation of the bonds and the amount thereof so transferred.

55. EXAMINATION OF BONDS AND RECORDS. (SEC. 5165.) The Comptroller of the Currency shall have at all times, during office hours, access to the books of the Treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the Comptroller to countersign; and the Treasurer shall have the like access to the book mentioned in section fifty-one hundred and sixty-three, during office hours, to ascertain the correctness of the entries in the same; and the Comptroller shall also at all times have access to the bonds on deposit with the Treasurer to ascertain their amount and condition.

56. ANNUAL EXAMINATION OF BONDS. (SEC. 5166.) Every association having bonds deposited in the office of the Treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the Comptroller of the Currency and with the accounts of the association, and, if they are found correct, to execute to the Treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the Treasurer at the date of the certificate. Such examination shall be made at such time or times during the ordinary business hours as the Treasurer and the Comptroller, respectively, may select, and may be made by an officer or agent of such association, duly appointed in writing for that purpose; and his certificate before mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of such certificate, signed by the Treasurer, shall be retained by the association.

57. GENERAL PROVISIONS RESPECTING BONDS. (SEC. 5167.) The bonds transferred to and deposited with the Treasurer of

the United States by any association for the security of its circulating notes shall be held exclusively for that purpose until such notes are redeemed, except as provided in this Title. The Comptroller of the Currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the Treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the Treasurer is redeemed below the amount of the circulation issued for the same the Comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as such depreciation continues. And the Comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the Treasurer by any association for other bonds of the United States authorized to be received as security for circulating notes if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: *Provided,* That the remaining bonds which shall have been transferred by the association offering to surrender circulating notes are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the hands of the Treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this Title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same.

58. AMOUNT OF CIRCULATION OBTAINABLE.— Sec. 10 of the act of July 12, 1882, as amended by act of March 14, 1900, provides that upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by exist-

ing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; and any national banking association now having bonds on deposit for the security of circulating notes, and upon which an amount of circulating notes has been issued less than the par value of the bonds, shall be entitled, upon due application to the Comptroller of the Currency, to receive additional circulating notes in blank to an amount which will increase the circulating notes held by such association to the par value of the bonds deposited, such additional notes to be held and treated in the same way as circulating notes of national banking associations heretofore issued, and subject to all the provisions of law affecting such notes: *Provided,* That the circulating notes furnished to national banking associations under the provisions of this act shall be of the denominations prescribed by law, except that no national banking association shall, after the passage of this act, be entitled to receive from the Comptroller of the Currency, or to issue or reissue or place in circulation, more than one-third in amount of its circulating notes of the denomination of five dollars: *And provided further,* That the total amount of such notes issued to any such association may equal at any time but shall not exceed the amount at such time of its capital stock actually paid in.

59. PREPARATION OF BANK CIRCULATION. (SEC. 5172.) In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply the associations entitled to receive the same, as amended by act of March 14, 1900. Such notes shall express upon their face that they are secured by United States bonds, deposited with the Treasurer of the United States, by the written or engraved signatures of the Treasurer and Register, and by the imprint of the seal of the

Treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier; and shall bear such devices and such other statements, and shall be in such form, as the Secretary of the Treasury shall, by regulation, direct.

60. CIRCULATION SHALL BEAR CHARTER NUMBER.— Sec. 5 of the act of June 20, 1874, provides that the Comptroller of the Currency shall, under such rules and regulations as the Secretary of the Treasury may prescribe, cause the charter numbers of the association to be printed upon all national-bank notes which may be hereafter issued by him.

61. CONTROL OF PLATES AND DIES. (SEC. 5173.) The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction and the expenses necessarily incurred in executing the laws respecting the procuring of such notes and all other expenses of the Bureau of the Currency [except as provided by sec. 3, act June 20, 1874, and sects. 6 and 8, act July 12, 1882] shall be paid out of the proceeds of the taxes or duties assessed and collected on the circulation of national banking associations under this title.

62. EXAMINATION OF PLATES AND DIES. (SEC. 5174.) The Comptroller of the Currency shall cause to be examined, each year, the plates, dies, but pieces [bed pieces], and other material from which the national-bank circulation is printed, in whole or in part, and file in his office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed, under such regulations as shall be prescribed by the Comptroller of the Currency and approved by the Secretary of the Treasury. The expenses of any such examination or destruction shall be paid out of any appropriation made by Congress for the special examination of national banks and bank-note plates.

63. CIRCULATION, FOR WHAT RECEIVABLE. (SEC. 5182.) After any association receiving circulating notes under this Title has caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promisory notes,

payable on demand at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency.

64. CIRCULATION OF GOLD BANKS. (SEC. 5185.) Associations may be organized in the manner prescribed by this Title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit circulating notes of different denominations, but none of them of less than five dollars, and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable.

65. WORN-OUT OR MUTILATED CIRCULATION. (SEC. 5184.) It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or surrendered to be canceled, shall be macerated in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certificate of such maceration, signed by the parties so appointed, shall be made in the books of the Comptroller, and a duplicate

thereof forwarded to the association whose notes are thus canceled.

66. PROVISIONS FOR REDEEMING CIRCULATION.— Sec. 3 of the act of June 20, 1874, provides that every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, assòrted or unassorted, shall be presented for redemption, in sums of one thousand dollars or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating notes so redeemed. And all notes of national banks, worn, defaced, mutilated, or otherwise unfit for circulation, shall, when received by any assistant treasurer, or at any designated depositary of the United States, be forwarded to the Treasurer of the United States for redemption as provided herein. And when such redemptions have been so reimbursed, the circulating notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed, and replaced as now provided by law: *Provided*, That each of said associations shall reimburse to the Treasury the charges for transportation and the costs for assorting such notes; and the associations hereafter organized shall also severally reimburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each associa-

tion shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer.

67. WITHDRAWING CIRCULATION.—Sec. 4 of the act of June 20, 1874, provides that any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes, which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the national-bank act; and the outstanding notes of said association, to an amount equal to the legal-tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: *Provided*, That the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars.

68. GENERAL PROVISIONS FOR WITHDRAWING CIRCULATION. — The act of July 12, 1882, provides: (SEC. 8.) That the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall, at the time of their deposit, be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national-bank notes during the preceding year, and shall thereupon pay such assessment; and all national banks which have heretofore made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed, and shall pay an assessment in the manner specified in section three of the act approved June twentieth, eighteen hundred and seventy-four, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June thirtieth, eighteen hundred and eighty-one.

SEC. 9. (As amended by act of March 14, 1900.) That any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the act of June twentieth, eighteen hundred and seventy-four, or as provided in this act,

is authorized to deposit lawful money and withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits: *Provided*, That not more than three millions of dollars of lawful money shall be deposited during any calendar month for this purpose: *And provided further*, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in conseqeuence thereof.

69. CIRCULATION OF EXTENDED BANKS.— Sec. 6 of the act of July 12, 1882, provides that the circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the Treasury of the United States, as provided in section three of the act of June twentieth, eighteen hundred and seventy-four, entitled "An act fixing the amount of United States notes, providing for redistribution of national bank currency, and for other purposes," and such notes when redeemed shall be forwarded to the Comptroller of the Currency, and destroyed, as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the Treasury of the United States sufficient to redeem the remainder of the circulation which was outstanding at the date of its extension, as provided in sections fifty-two hundred and twenty-two, fifty-two hundred and twenty-four, and fifty-two hundred and twenty-five of the Revised Statutes; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided for by this act, bearing such devices, to be approved by the Secretary of the Treasury, as shall make them readily distinguishable from the circulating notes heretofore issued: *Provided, however,* That each banking association which shall obtain the benefit of this act shall reimburse to the Treasury the cost of preparing the plate or plates for such new circulating notes as shall be issued to it.

70. CIRCULATION OF LIQUIDATING BANKS. (SEC. 5225.) Whenever the Treasurer has redeemed any of the notes of an

association which has commenced to close its affairs, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and destroyed in the manner prescribed in section fifty-one hundred and eighty-four.

71. CIRCULATION OF CLOSED BANKS.— Sec. 8. of the act of June 20, 1874, provides: And it shall be the duty of the Treasurer, assistant treasurers, designated depositaries, and national bank depositaries of the United States to assort and return to the Treasury for redemption the notes of such national banks as have failed, or gone into voluntary liquidation for the purpose of winding up their affairs, and of such as shall hereafter so fail or go into liquidation.

72. REGULATIONS FOR REDEMPTION RECORDS. (SEC. 5232.) The Secretary of the Treasury may, from time to time, make such regulations respecting the disposition to be made of circulating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper.

73. REDEEMED NOTES TO BE CANCELED. (SEC. 5233.) All notes of national banking associations presented at the Treasury of the United States for payment shall, on being paid, be canceled.

74. REDEMPTION IN UNITED STATES NOTES.— Sec. 3 of the act approved June 20, 1874, provides that when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes.

75. DISPOSITION OF REDEMPTION ACCOUNT.— Sec. 6 of the act of July 14, 1890, provides that upon the passage of this act the balances standing with the Treasurer of the United States to the respective credits of national banks for deposits made to redeem the circulating notes of such banks, and all deposits thereafter received for like purpose, shall be covered into the Treasury as a miscellaneous receipt, and the Treasury of the United States shall redeem from the general cash in the Treasury the circulating notes of said banks which may come into his possession subject to redemption; and upon the certificate

of the Comptroller of the Currency that such notes have been received by him and that they have been destroyed and that no new notes will be issued in their place, reimbursement of their amount shall be made to the Treasurer, under such regulations as the Secretary of the Treasury may prescribe, from an appropriation hereby created, to be known as "national-bank notes, redemption account." But the provisions of this act shall not apply to the deposits received under section three of the act of June twentieth, eighteen hundred and seventy-four, requiring every national bank to keep in lawful money with the Treasurer of the United States a sum equal to five per centum of its circulation, to be held and used for the redemption of its circulating notes; and the balance remaining of the deposits so covered shall, at the close of each month, be reported on the monthly public debt statement as debt of the United States bearing no interest.

76. REDEMPTION OF INCOMPLETE CIRCULATION.—The act of July 28, 1892, provides that the provisions of the Revised Statutes of the United States, providing for the redemption of national-bank notes, shall apply to all national-bank notes that have been or may be issued to, or received by, any national bank, notwithstanding such notes may have been lost by or stolen from the bank and put in circulation without the signature or upon the forged signature of the president or vice-president and cashier.

77. BANKS TAKE CIRCULATION AT PAR. (SEC. 5196.) Every national banking association formed or existing under this Title shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold.

78. ISSUE OF OTHER NOTES PROHIBITED. (SEC. 5183.) No national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the provisions of this Title.

79. FRAUDULENT NOTES TO BE MARKED.— Sec. 5 of the act of June 30, 1876, provides that all United States officers charged with the receipt or disbursement of public moneys, and all officers of national banks, shall stamp or write in plain let-

ters the word "counterfeit," "altered," or "worthless," upon all fraudulent notes issued in the form of and intended to circulate as money which shall be presented at their places of business; and if such officer shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face value thereof.

TAX ON CIRCULATION.

80. TAX ON CIRCULATION. (SEC. 5214.) In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half year upon the average amount of its notes in circulation. Section 13 of the act of Congress approved March 14, 1900, provides that every national banking association having on deposit, as provided by law, bonds of the United States bearing interest at the rate of two per centum per annum, issued under the provisions of this act, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said two per centum bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of the Revised Statutes.

81. SEMIANNUAL RETURN OF CIRCULATION. (SEC. 5215.) In order to enable the Treasurer to assess the duties imposed by the preceding sections, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may

prescribe, of the average amount of its notes in circulation for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States.

82. PROCEEDINGS ON DEFAULT. (SEC. 5216.) Whenever any association fails to make the half yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency.

83. ENFORCING TAX ON CIRCULATION. (SEC. 5217.) Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association.

84. REFUNDING EXCESS TAX. (SEC. 5218.) In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of theUnited States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

85. CIRCULATION, WHEN EXEMPT FROM TAX. (SEC. 3411.) Whenever the outstanding circulation of any bank, association, corporation, company, or person is reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation deposits in the Treasury of the United States, in lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation.

86. TAX ON UNAUTHORIZED CIRCULATION.— Secs. 19, 20, and 21 of the act of February 8, 1875, provide:

SEC. 19. That every person, firm, association, other than national-bank associations, and every corporation, State bank, or State banking association shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them.

SEC. 20. That every such person, firm, association, corporation, State bank, or State banking association, and also every national banking association, shall pay a like tax of ten per centum on the amount of notes of any person, firm, association, other than a national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them.

SEC. 21. That the amount of such circulating notes, and of the tax due thereon, shall be returned, and the tax paid at the same time, and in the same manner, and with like penalties for failure to return and pay the same, as provided by law for the return and payment of taxes on deposits, capital, and circulation imposed by the existing provisions of internal-revenue law.

87. SEMIANNUAL RETURN OF TAXABLE CIRCULATION. (SEC. 3414.) A true and complete return of the monthly amount of circulation, as aforesaid, and of the monthly amount of notes of persons, town, city, or municipal corporation, State banks, or State banking associations paid out as aforesaid for the previous six months, shall be made and rendered in duplicate on the first day of December and the first day of June by each of such banks, associations, corporations, companies, or persons, with a declaration annexed thereto, under the oath of such person, or of the president or cashier of such bank, association, corporation, or company, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful statement of the amounts subject to tax, as aforesaid; and one copy shall be transmitted to the collector of the district in which any such bank, association, corporation, or company is situated, or in which such person has his place of business, and one copy to the Commissioner of Internal Revenue.

88. FAILURE TO MAKE SUCH RETURN. (SEC. 3415.) In default of the returns provided in the preceding section the amount of circulation, and notes of persons, town, city, and municipal corporations, State banks, and State banking associations paid out, as aforesaid, shall be estimated by the Commissioner of Internal Revenue, upon the best information he can obtain. And for any refusal or neglect to make return and payment any such bank, association, corporation, company, or person so in default shall pay a penalty of two hundred dollars, besides the additional penalty and forfeitures provided in other cases.

89. TAX ON CONVERTED BANK CIRCULATION. (SEC. 3416.) Whenever any State bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such State bank or banking association, such national banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such State bank or banking association.

90. TAX PROVISIONS RESTRICTED. (SEC. 3417.) The provisions of this chapter relating to the tax on the circulation of banks and to their returns, except as contained in sections thirty-four hundred and eleven, thirty-four hundred and twelve, thirty-four hundred and thirteen, and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not apply to associations which are taxed under and by virtue of Title "NATIONAL BANKS."

91. TAXATION OF NOTES, ETC. (SEC. 3701.) All stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under State or municipal or local authority. The act of August 13, 1894, provides: (SEC. 1.) The circulating notes of national banking

associations and United States legal-tender notes and other notes and certificates of the United States, payable on demand and circulating or intended to circulate as currency, and gold, silver, or other coin shall be subject to taxation as money on hand or on deposit under the laws of any State or Territory: *Provided*, That any such taxation shall be exercised in the same manner and at the same rate that any such State or Territory shall tax money or currency circulating as money within its jurisdiction.

SEC. 2. That the provisions of this act shall not be deemed or held to change existing laws in respect of the taxation of national banking associations.

REGULATION OF THE BANKING BUSINESS.

92. LAWS GOVERNING CERTAIN ASSOCIATIONS. (SEC. 5157.) The provisions of chapters two, three, and four [three, five, and seven of this edition] of this Title, which are expressed without restrictive words, as applying to "national banking

associations," or to "associations," apply to all associations organized to carry on the business of banking under any act of Congress.

93. PLACE OF BUSINESS. (SEC. 5190.) The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.

94. RESERVE CITIES AND RESERVE REQUIREMENTS. (SEC. 5191.) Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its deposits in all respects; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its deposits in all respects.

95. RESERVE NOT MAINTAINED. (SEC. 5191.) Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion between the aggregate amount of its deposits and its lawful money of the United States has been restored. And the Comptroller of the Currency may notify any association, whose lawful-money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four.

96. RESERVE AGENTS' BALANCES COUNTED AS RESERVE. (SEC. 5192.) Three-fifths of the reserve of fifteen per centum

required by the preceding section to be kept may consist of balances due to an association from associations approved by the Comptroller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this Title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburg, Richmond, Saint Louis, San Francisco, and Washington.

97. CLEARING-HOUSE CERTIFICATES COUNTED AS RESERVE. — Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association shall also be deemed to be lawful money in the possession of any association belonging to such clearing house holding and owning such certificate, within the preceding section.

98. REDEMPTION FUND COUNTED AS RESERVE.— Sec. 3 of the act of June 20, 1874, provides that the five per cent redemption fund, which shall at all times be kept on deposit with the Treasurer of the United States, shall be counted as a part of the lawful reserve.

99. UNITED STATES NOTE CERTIFICATES COUNTED AS RESERVE. (SEC. 5193.) The Secretary of the Treasury may receive United States notes on deposit, without interest, from any national banking associations, in sums of not less than ten thousand dollars, and issue certificates therefor in such form as he may prescribe, in denominations of not less than five thousand dollars, and payable on demand in United States notes at the place where the deposits were made. The notes so deposited shall not be counted as part of the lawful-money reserve of the association; but the certificates issued therefor may be counted as part of its lawful-money reserve, and may be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made. (Repealed March 14, 1900.)

100. REDEMPTION OF SUCH CERTIFICATES. (SEC. 5194.) The power conferred on the Secretary of the Treasury, by the preceding section shall not be exercised so as to create any expansion or contraction of the currency; and United States notes for which certificates are issued under that section, or

other United States notes of like amount, shall be held as special deposits in the Treasury and used only for redemption of such certificates.

101. UNITED STATES GOLD CERTIFICATES COUNTED AS RESERVE.— Section 12 of the act of July 12, 1882, provides that the Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or assistant treasurers of the United States, in sums not less than twenty dollars, and to issue certificates therefor in denominations of not less than twenty dollars each, corresponding with the denominations of United States notes. The coin deposited for or representing the certificates of deposit shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; and such certificates, as also silver certificates, when held by any national banking association, shall be counted as part of its lawful reserve; and no national banking association shall be a member of any clearing house in which such certificates shall not be receivable in the settlement of clearing-house balances: *Provided,* That the Secretary of the Treasury shall suspend the issue of such gold certificates whenever the amount of gold coin and gold bullion in the Treasury reserved for the redemption of United States notes falls below one hundred millions of dollars; and the provisions of section fifty-two hundred and seven of the Revised Statutes shall be applicable to the certificates herein authorized and directed to be issued.

102. RESERVE REQUIREMENTS FOR GOLD BANKS. (SEC. 5186.) Every association organized for the purpose of issuing notes payable in gold shall at all times keep on hand not less than twenty-five per centum of its outsanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this Title: *Provided,* That, in applying the same to associations organized for issuing gold notes, the terms "lawful money" and "lawful money of the United States" shall be construed to mean gold or silver coin of the United States; and the circulation of such association

shall not be within the limitation of circulation mentioned in this Title.

103. RESERVE DEPOSIT IN CENTRAL RESERVE CITY. (SEC. 5195.) Each association organized in any of the cities named in section fifty-one hundred and ninety-one may keep one-half of its lawful-money reserve in cash deposits in the city of New York. But the foregoing provisions shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. This section shall not relieve any association from its liability to redeem its circulating notes at its own counter at par in lawful money on demand.

104. ADDITIONAL RESERVE CITIES — Sec. 1 of the act of March 3, 1887, as amended by the act of March 3, 1903, provides that whenever three-fourths in number of the national banks located in any city of the United States having a population of twenty-five thousand people shall make application to the Comptroller of the Curency, in writing, asking that the name of the city in which such banks are located shall be added to the cities named in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the Revised Statutes, the Comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-five of the Revised Statutes.

105. ADDITIONAL CENTRAL RESERVE CITIES.—Sec. 2 of the act of March 3, 1887, provides that whenever three-fourths in number of the national banks located in any city of the United States having a population of two hundred thousand people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a central reserve city, like the city of New York, in which one-half of the lawful-money reserve of the national banks located in other reserve cities may be deposited, as provided in section fifty-one hundred and ninety-five of the Revised Statutes, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city

shall at all times thereafter have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one of the Revised Statutes.

106. REAL ESTATE. (SEC. 5137.) A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

107. INTEREST. (SEC. 5197.) Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

108. PENALTY FOR UNLAWFUL INTEREST. (SEC. 5198.) The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carried with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred.

109. SURPLUS AND DIVIDENDS. (SEC. 5199.) The directors of any association may semiannually declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

110. RESTRICTION ON LOANS. (SEC. 5200.) The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed.

111. ASSOCIATIONS MUST NOT HOLD THEIR OWN STOCK. (SEC. 5201.) No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four.

112. RESTRICTION ON BANK'S LIABILITY. (SEC. 5202.) No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

113. IMPROPER USE OF BANK CIRCULATION. (SEC. 5203.) No association shall, either directly or indirectly, pledge or hypothecate any of its notes of circulation for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

114. UNEARNED DIVIDENDS PROHIBITED. (SEC. 5204.) No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

115. ASSESSMENT FOR IMPAIRMENT OF CAPITAL. (SEC. 5205.) Every association which shall have failed to pay up

its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four.

116. PROVISION FOR ENFORCEMENT OF ASSESSMENT.—Sec. 4 of the act of June 30, 1876, provides that if any shareholder or shareholders of a bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

117. PROHIBITION AGAINST UNCURRENT NOTES. (*SEC.* 5206.) No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation the notes of any bank or banking association which are not, at any such time, receivable, at par, on deposit, and in payment of debts by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States.

118. LIST OF SHAREHOLDERS. (SEC. 5210.) The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency.

119. REPORTS OF CONDITION. (SEC. 5211.) Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the associations at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.

120. VERIFICATION OF SUCH REPORTS.—The act of February 26, 1881, provides that the oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer

having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven: *Provided*, That the officer administering the oath is not an officer of the bank.

121. REPORTS OF DIVIDENDS AND EARNINGS. (SEC. 5212.) In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such dividend and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of the president or cashier of the association.

122. PENALTY FOR FAILURE TO REPORT. (SEC. 5213.) Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States.

123. REPORTS OF OTHER BANKS.—Sec. 6 of the act of June 30, 1876, as amended by acts of March 3, 1901, and June 30, 1902, provides that all banks or savings companies or institutions organized under authority of any act of Congress to do business in the District of Columbia shall be, and are hereby, required to make to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and publish, under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided, which penalties may be collected by suit before the supreme court of the District of Columbia.

124. STATE TAXATION OF NATIONAL BANKS. (SEC. 5219.) Nothing herein shall prevent all the shares in any association

from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

125. NATIONAL-BANK EXAMINERS. (SEC. 5240.) The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller.

126. QUALIFICATION FOR EXAMINER. (SEC. 5240.) But no person shall be appointed to examine the affairs of any banking association of which he is a director or other officer.

127. COMPENSATION OF EXAMINERS. (SEC. 5240.) All persons appointed to be examiners of national banks not located in the redemption cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars;

those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective association so examined, and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations; and persons appointed to make examinations of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided.

128. EXAMINATIONS IN DISTRICT OF COLUMBIA. (SEC. 332.) The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of national banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations.

129. LIMITATION OF VISITORIAL POWERS. (SEC. 5241.) No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice.

130. USE OF "NATIONAL" IN TITLES. (SEC. 5243.) All banks not organized and transacting business under the national currency laws, or under this Title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings banks authorized by Congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partner-

ship; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is permitted or repeated.

EXTENSION OF CORPORATE EXISTENCE.

131. CORPORATE EXISTENCE MAY BE EXTENDED.—The act of July 12, 1882, provides: (SEC. 1) That any national banking association organized under the acts of February twenty-fifth, eighteen hundred and sixty-three, June third, eighteen hundred and sixty-four, and February fourteenth, eighteen hundred and eighty, or under sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six, and fifty-one hundred and fifty-four of the Revised Statutes of the United States, may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency, to be granted as hereinafter provided, extend its period of succession by amending its articles of association for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, unless sooner dissolved by the act of shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed.

132. CONSENT OF TWO-THIRDS NECESSARY. (SEC. 2.) That such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by its president or cashier, to the Comptroller of the Currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until the

Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with and is authorized to have succession for the extended period named in the amended articles of association.

133. SPECIAL EXAMINATION OF BANK. (SEC. 3.) That upon the receipt of the application and certificate of the association provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval.

134. STATUS NOT CHANGED BY EXTENSION. (SEC. 4.) That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession.

135. DISSENTING SHAREHOLDERS MAY WITHDRAW. (SEC. 5.) That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committe of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said appraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and other-

wise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder, from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section: *Provided*, That in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares of the new association in proportion to the number of shares held by them respectively in the expiring association.

136. REEXTENSION OF CORPORATE EXISTENCE.—The act of Congress, approved April 12, 1902, provides that the Comptroller of the Currency is hereby authorized in the manner provided by, and under the conditions and limitations of the act of July 12, 1882, to extend for a further period of twenty years the charter of any national banking association extended under said act which shall desire to continue its existence after the expiration of its charter.

LIQUIDATION AND RECEIVERSHIP.

137. TWO-THIRDS VOTE REQUIRED FOR LIQUIDATION. (SEC. 5220.) Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.

138. NOTICE OF VOLUNTARY LIQUIDATION. (SEC. 5221.) Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and the publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment.

139. DEPOSIT OF LAWFUL MONEY. (SEC. 5222.) Within six months from the date of the vote to go into liquidation the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account.

140. NO DEPOSIT REQUIRED FOR CONSOLIDATION. (SEC. 5223.) An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation.

141. BONDS OF LIQUIDATING BANKS. (SEC. 5224.) Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure payment of its notes shall be reassigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the

United States. And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank at public auction in New York City, and, after providing for the redemption and cancellation of said circulation, and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representatives.

142. BANKS WHOSE EXISTENCE HAS EXPIRED.—Sec. 7 of the act of July 12, 1882, provides that national banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections fifty-two hundred and twenty-one and fifty-two hundred and twenty-two of the Revised Statutes in the same manner as if the shareholders had voted to go into liquidation, as provided in section fifty-two hundred and twenty of the Revised Statutes; and the provisions of sections fifty-two hundred and twenty-four and fifty-two hundred and twenty-five of the Revised Statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such associations is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed.

143. PROTEST OF BANK CIRCULATION. (SEC. 5226.) Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, the holder may cause the same to be protested, in one package by a notary public, unless the president or cashier of the association whose notes are presented for payment offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the nonpayment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded

is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

144. BONDS FORFEITED IF CIRCULATION IS DISHONORED. (SEC. 5227.) On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

145. BANK MAY ENJOIN FURTHER PROCEEDINGS. (SEC. 5237.) Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or Territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of the jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

146. WHERE PROCEEDINGS MUST BE BROUGHT. (SEC. 736.) All procedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any

law relating to national banking associations, shall be had in the district where such association is located.

147. SUSPENSION OF BUSINESS AFTER DEFAULT. (SEC. 5228.) After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.

148. NOTICE TO PRESENT CIRCULATION FOR REDEMPTION. (SEC. 5229.) Immediately upon declaring the bonds of an association forfeited for nonpayment of its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall, by general rules or otherwise direct, to the holders of the circulating notes of such association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid.

149. BONDS SOLD AT PUBLIC AUCTION. (SEC. 5230.) Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of canceling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association.

150. FIRST LIEN FOR REDEEMING CIRCULATION. (SEC. 5230.) For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims what-

soever, except the necessary costs and expenses of administering the same.

151. BONDS SOLD AT PRIVATE SALE. (SEC. 5231.) The Comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four.

152. APPOINTMENT AND DUTIES OF RECEIVER. (SEC. 5234.) On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

153. WHEN RECEIVER MAY BE APPOINTED.—Sec. 1 of the act of June 30, 1876, provides that whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national bank-

ing association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundered and thirty-four of said statutes.

A receiver may also be appointed, under the provisions of section fifty-two hundred and thirty-four of the Revised Statutes of the United States, for the following violations of law:

Where the capital stock of a national bank has not been fully paid in and it is thus reduced below the legal minimum and remains so for thirty days. (Sec. 5141, R. S.)

For failure to make good the lawful-money reserve within thirty days after notice. (Sec. 5191, R. S.)

Where a bank purchases or acquires its own stock, to prevent loss upon a debt previously contracted in good faith, and the same is not sold or disposed of within six months from the time of its purchase. (Sec. 5201, R. S.)

For failure to make good any impairment in its capital stock and refusing to go into liquidation within three months after receiving notice. (Sec. 5205, R. S.)

For false certification of checks by any officer, clerk, or agent. (Sec. 5208, R. S.)

154. NOTICE TO CREDITORS OF INSOLVENT BANKS. (SEC. 5235.) The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same and to make legal proof thereof.

155. DISTRIBUTION OF ASSETS OF INSOLVENT BANKS. (SEC. 5236.) From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to

his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

156. EXPENSES OF RECEIVERSHIP—HOW PAID. (SEC. 5238.) All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

157. FORFEITURE OF CHARTER. (SEC. 5239.) If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved.

158. INDIVIDUAL LIABILITY OF DIRECTORS. (SEC. 5239.) And in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.

159. RECEIVER MAY PURCHASE PROPERTY TO PROTECT HIS TRUST.—The act of March 29, 1886, provides: (SEC. 1.) That whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities

that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

SEC. 2. That such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case and his recommendation as to the amount of money which in his judgment should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States.

SEC. 3. That whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest to the amount as may be recommended and allowed and for the purpose for which such allowance was made: *Provided, however,* That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order.

160. TAXES ON INSOLVENT NATIONAL BANKS REMITTED.—The act of March 1, 1879, provides that whenever and after any bank has ceased to do business by reason of insolvency or bankruptcy no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Cur-

rency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall so appear to him, is authorized to remit so much of said tax against insolvent State and savings banks as shall be found to affect the claims of their depositors.

161. APPOINTMENT AND QUALIFICATION OF SHAREHOLDERS' AGENT.— Sec. 3 of the act of June 30, 1876, as amended by acts of August 3, 1892, and March 2, 1897, provides that whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so

far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof.

162. DUTIES OF SHAREHOLDERS' AGENT.— Sec. 3 of the act of June 30, 1876, as amended by acts of August 3, 1892, and March 2, 1897, provides: Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the

circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the

Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

163. ILLEGAL PREFERENCE OF CREDITORS. (SEC. 5242.) All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void. No attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any State, county, or municipal court.

164. CREDITOR'S BILL AGAINST SHAREHOLDERS.—Sec. 2 of the act of June 30, 1876, provides that when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

CRIMES, JURISDICTION, ETC.

165. PENALTY FOR IMPROPER COUNTERSIGNING OR DELIVERING CIRCULATION. (SEC. 5187.) No officer acting under the provisions of this Title shall countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this Title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years.

166. PENALTY FOR PLEDGING UNITED STATES NOTES OR BANK CIRCULATION. (SEC. 5207.) No association shall hereafter offer or receive United States notes or national-bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one-third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable for a further sum equal to one-quarter of

the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit. Sec. 12 of the act of July 12, 1882, provides that the provisions of this section shall apply to the United States certificates of gold and silver coin.

167. PENALTY FOR IMITATING BANK CIRCULATION FOR ADVERTISING PURPOSES. (SEC. 5188.) It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use any business or professional card, notice, placard, circular, handbill, or advertisements in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States which has been or may be issued under this Title, or any act of Congress, or to write, print, or otherwise impress upon any such note, obligation, or security any business or professional card, notice, or advertisement, or any notice or advertisement of any matter or thing whatever. Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable one-half to the use of the informer.

168. PENALTY FOR MUTILATING CIRCULATION. (SEC. 5189.) Every person who mutilates, cuts, defaces, disfigures, or perforates with holes, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt, issued by any national banking association, or who causes or procures the same to be done, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall be liable to a penalty of fifty dollars, recoverable by the association.

169. PENALTY FOR COUNTERFEITING CIRCULATION. (SEC. 5415.) Every person who falsely makes, forges, or counterfeits, or causes or procures to be made, forged, or counterfeited, or willingly aids or assists in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or who passes, utters, or publishes, or attempts to pass, utter, or publish, any false, forged, or counterfeited note purporting to be issued by any such association doing a banking business, knowing the same to be falsely

made, forged, or counterfeited, or who falsely alters, or causes or procures to be falsely altered, or willingly aids or assists in falsely altering any such circulating notes, or passes, utters, or publishes, or attempts to pass, utter, or publish as true, any falsely altered or spurious circulating note issue, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be imprisoned at hard labor not less than five years nor more than fifteen years, and fined not more than one thousand dollars.

170. WHAT ARE OBLIGATIONS OF THE UNITED STATES. (SEC. 5413.) The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national-bank currency, coupons, United States notes, Treasury notes, fractional notes, certificates of deposit, bills, checks, or drafts for money drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may [be] issued under any act of Congress.

171. PENALTY FOR ILLEGAL POSSESSION OR USE OF MATERIAL FOR CIRCULATION. (SEC. 5430.) Every person having control, custody, or possession of any plate, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, who uses such plate, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation, or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; and every person who engraves, or causes or procures to be engraved, or assists in engraving, any plate in the likeness of any plate designed for the printing of such obligation or other security, or who sells any such plate, or who brings into the United States from any foreign place any such plate, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate be used for the printing of the obligations or other securities of the United States; or who has in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such obligation or other security has been printed, with intent to use such plate,

or suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or who has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security, engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; and every person who prints, photographs, or in any other manner makes or executes, or causes to be printed, photographed, made, or executed, or aids in printing, photographing, making, or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or who sells any such engraving, photograph, print, or impression, except to the United States, or who brings into the United States from any foreign place any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States, or who has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not more than fifteen years, or by both.

172. PENALTY FOR PASSING COUNTERFEIT CIRCULATION. (SEC. 5431.) Every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or bring into the United States with intent to pass, publish, utter, or sell, or keeps in possession or conceals, with like intent, any falsely made, forged, counterfeited, or altered obligation, or other security of the United States, shall be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than fifteen years.

173. PENALTY FOR TAKING UNAUTHORIZED IMPRESSION OF TOOLS. (SEC. 5432.) Every person who, without authority from the United States, takes, procures, or makes, upon lead, foil, wax, plaster, paper, or any other substance or material, an impression, stamp, or imprint of, from, or by the use of, any

bedplate, bedpiece, die, roll, plate, seal, type, or other tool, implement, instrument, or thing used or fitted, or intended to be used, in printing, stamping, or impressing, or in making other tools, implements, instruments, or things, to be used, or fitted or intended to be used, in printing, stamping, or impressing any kind or description of obligation or other security of the United States, now authorized or hereafter to be authorized by the United States, or circulating note or evidence of debt of any banking association under the laws thereof, shall be punished by imprisonment at hard labor not more than ten years, or by a fine of not more than five thousand dollars, or both.

174. PENALTY FOR HAVING SUCH IMPRESSIONS. (SEC. 5433.) Every person who, with intent to defraud, has in his possession, keeping, custody, or control, without authority from the United States, any imprint, stamp, or impression, taken or made upon any substance or material whatsoever, of any tool, implement, instrument, or thing used, or fitted, or intended to be used for any of the purposes mentioned in the preceding section; or who, with intent to defraud, sells, gives, or delivers any such imprint, stamp, or impression to any other person, shall be punished by imprisonment at hard labor not more than ten years, or by a fine of not more than five thousand dollars.

175. PENALTY FOR DEALING IN COUNTERFEIT CIRCULATION. (SEC. 5434.) Every person who buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be imprisoned at hard labor not more than ten years, or fined not more than five thousand dollars, or both.

176. PENALTY FOR ISSUING CIRCULATION OF EXPIRED ASSOCIATIONS. (SEC. 5437.) In all cases where the charter of any corporation which has been or may be created by act of Congress has expired or may hereafter expire, if any director, officer, or agent of the corporation, or any trustee thereof or any agent of such trustee, or any person having in his posses-

sion or under his control the property of the corporation for the purpose of paying or redeeming its notes and obligations, knowingly issues, reissues, or utters as money, or in any other way knowingly puts in circulation any bill, note, check, draft, or other security purporting to have been made by any such corporation whose charter has expired, or by any officer thereof, or purporting to have been made under authority derived therefrom, or if any person knowingly aids in any such act, he shall be punished by a fine of not more than ten thousand dollars, or by imprisonment not less than one year nor more than five years, or by both such fine and imprisonment. But nothing herein shall be construed to make it unlawful for any person, not being such director, officer, or agent of the corporation, or any trustee thereof, or any agent of such trustee, or any person having in his possession or under his control the property of the corporation for the purpose hereinbefore set forth, who has received or may hereafter receive such bill, note, check, draft, or other security, bona fide and in the ordinary transactions of business, to utter as money and otherwise circulate the same.

177. FALSE CERTIFICATION OF CHECKS. (SEC. 5208.) It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four.

178. PENALTY FOR FALSE CERTIFICATION OF CHECKS.—Sec. 13 of the act of July 12, 1882, provides that any officer, clerk, or agent of any national banking association who shall willfully violate the provisions of section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who

shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.

179. PENALTY FOR OFFICIAL MALFEASANCE. (SEC. 5209.) Every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

180. JURISDICTION OF CIRCUIT COURTS TO ENJOIN COMPTROLLER. (SEC. 629.) The circuit courts shall have original jurisdiction of all suits brought by any banking association established in the district for which the court is held, under the provisions of Title "THE NATIONAL BANKS," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said Title.

181. GENERAL JURISDICTION OF NATIONAL-BANK CASES.—Sec. 4 of the act of July 12, 1882, provides that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking

business where such national banking associations may be doing business when such suits may be begun. And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed. Sec. 4 of the act of March 3, 1887, provides that all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

182. SEALED CERTIFICATES OF COMPTROLLER ARE COMPETENT EVIDENCE. (SEC. 884.) Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

183. CERTIFIED COPY OF ORGANIZATION CERTIFICATE AS EVIDENCE. (SEC. 885.) Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association and of every matter which could be proved by the production of the original certificate.

184. SUITS AGAINST UNITED STATES OFFICERS OR AGENTS. (SEC. 380.) All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

185. INDIAN TERRITORY.—Sec. 31 of the Act of May 2, 1890, provides that all laws relating to national banking associations shall have the same force and effect in Indian Territory as elsewhere in the United States.

TRUST COMPANIES, ETC., DISTRICT OF COLUMBIA.

186. PROVISION FOR ORGANIZATION.—The act of October 1, 1890, sec. 1, provides that corporations may be formed within the District of Columbia for the purposes hereinafter mentioned in the following manner: Any time hereafter any number of natural persons, citizens of the United States, not less than twenty-five, may associate themselves together to form a company for the purpose of carrying on in the District of Columbia any one of the three classes of business herein specified, to wit:

First. A safe deposit, trust, loan, and mortgage business.

Second. A title insurance, loan, and mortgage business.

Third. A security, guaranty, indemnity, loan, and mortgage

business: *Provided*, That the capital stock of any of said companies shall not be less than one million of dollars: *Provided further,* That any of said companies may also do a storage business when their capital stock amounts to the sum of not less than one million two hundred thousand dollars.

187. ORGANIZATION CERTIFICATE OF COMPANY. (SEC. 2.) That such persons shall, under their hands and seals, execute, before some officer in said District competent to take the acknowledgement of deeds, an organization certificate, which shall specifically state —

First. *Title.*— The name of the corporation.

Second. *Purposes.*— The purposes for which it is formed.

Third. *Period of existence.*— The term for which it is to exist, which shall not exceed the term of fifty years, and be subject to alteration, amendment, or repeal by Congress at any time.

Fourth. *Officers.*— The number of its directors, and the names and residences of the officers who for the first year are to manage the affairs of the company.

Fifth. *Capital stock.*— The amount of the capital stock and its subdivision into shares.

188. CHARTER OBTAINED FROM DISTRICT COMMISSIONERS. (SEC. 3.) That this certificate shall be presented to the Commissioners of the District, who shall have power and discretion to grant or to refuse to said persons a charter of incorporation upon the terms set forth in the said certificate and the provisions of this act.

189. NOTICE OF INTENTION TO APPLY FOR CHARTER. (SEC. 4.) That previous to the presentation of the said certificate to the said Commissioners notice of the intention to apply for such charter shall be inserted in two newspapers of general circulation printed in the District of Columbia at least four times a week for three weeks, setting forth briefly the name of the proposed company, its character and object, the names of the proposed corporators, and the intention to make application for a charter on a specified day, and the proof of such publication shall be presented with said certificate when presentation thereof is made to said Commissioners.

190. CHARTER FILED WITH RECORDER OF DEEDS FOR THE DISTRICT. (SEC. 5.) That if the charter be granted as afore-

said it, together with the certificate of the Commissioners granting the same indorsed thereon, shall be filed for record in the office of the recorder of deeds for the District of Columbia, and shall be recorded by him. On the filing of the said certificate with the said recorder of deeds as herein provided, approved as aforesaid by the said Commissioners, the persons named therein and their successors shall thereupon and thereby be and become a body corporate and politic, and as such shall be vested with all the powers and charged with all the liabilities conferred upon and imposed by this act upon companies organized under the provisions hereof: *Provided, however,* That no corporation created and organized under the provisions hereof, or availing itself of the provisions hereof as provided in section eleven, shall be authorized to transact the business of a trust company, or any business of a fiduciary character, until it shall have filed with the Comptroller of the Currency a copy of its certificate of organization and charter and shall have obtained from him and filed the same for record with the said recorder of deeds a certificate that the capital stock of said company has been paid in and the deposit of securities made with said Comptroller in the manner and to the extent required by this act.

191. TRUST COMPANIES UNDER COMPTROLLER'S SUPERVISION. (SEC. 6.) That all companies organized hereunder, or which shall under the provisions hereof become entitled to transact the business of a trust company, shall report to the Comptroller of the Currency in the manner prescribed by sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen, Revised Statutes of the United States, in the case of national banks, and all acts amendatory thereof or supplementary thereto, and with similar provisions for compensating examiners, and shall be subject to like penalties for failure to do so. The Comptroller shall have and exercise the same visitorial powers over the affairs of the said corporation as is conferred upon him by section fifty-two hundred and forty of the Revised Statutes of the United States in the case of national banks. He shall also have power, when in his opinion it is necessary, to take possession of any such company for the reasons and in the manner and to the same extent as are provided in the laws of the United States with respect to national banks.

192. POWERS OF THESE COMPANIES. (SEC. 7.) That all companies organized under this act are hereby declared to be corporations possessed of the powers and functions of corporations generally, and shall have power—

First. *Contracts.*— To make contracts.

Second. *Suits.*— To sue and be sued, implead and be impleaded, in any court as fully as natural persons.

Third. *Seal.*— To make and use a common seal and alter the same at pleasure.

Fourth. *Loans.*— To loan money.

Fifth. *Special powers.*— When organized under subdivision one of the first section of this act to accept and execute trusts of any and every description which may be committed or transferred to them, and to accept the office and perform the duties of a receiver, assignee, executor, administrator, guardian of the estates of minors, with the consent of the guardian of the person of such minor, and committee of the estates of lunatics and idiots whenever any trusteeship or any such office or appointment is committed or transferred to them, with their consent, by any person, body politic or corporate, or by any court in the District of Columbia, and all such companies organized under the first subdivision of section one of this act are further authorized to accept deposits of money for the purposes designated herein upon such terms as may be agreed upon from time to time with depositors, and to act as agent for the purpose of issuing or countersigning the bonds or obligations of any corporation, association, municipality, or State, or other public authority, and to receive and manage any sinking fund on any such terms as may be agreed upon, and shall have power to issue its debenture bonds upon deeds of trust or mortgages of real estate to a sum not exceeding the face value of said deeds of trust or mortgages, and which shall not exceed fifty per centum of the fair cash value of the real estate covered by said deeds or mortgages, to be ascertained by the Comptroller of the Currency. But no debenture bonds shall be issued until the securities on which the same are based have been placed in the actual possession of the trustee named in the debenture bonds, who shall hold said securities until all of said bonds are paid; and when organized under the second subdivision of the first section of this act said company is authorized to insure titles

to real estate and to transact generally the business mentioned in said subdivision; and when organized under the third subdivision of section one of this act said company is hereby authorized, in addition to the loan and mortgage business therein mentioned, to secure, guaranty, and insure individuals, bodies politic, associations, and corporations against loss by or through trustees, agents, servants, or employees, and to guaranty the faithful performance of contracts and of obligations of whatever kind entered into by or on the part of any person or persons, association, corporation or corporations, and against loss of every kind: *Provided,* That any corporation formed under the provisions of this act when acting as trustee shall be liable to account for the amounts actually earned by the moneys held by it in trust in addition to the principal so held; but such corporation may be allowed a reasonable compensation for services performed in the care of the trust estate.

193. COMPETENT TO ACT AS TRUSTEE, ETC. (SEC. 8.) That in all cases in which application shall be made to any court in the District of Columbia, or wherever it becomes necessary or proper for said court to appoint a trustee, receiver, administrator, guardian of the estate of a minor, or committee of the estate of a lunatic, it shall and may be lawful for said court (but without prejudice to any preference in the order of any such appointments required by existing law) to appoint any such company organized under the first subdivision of section one of this act, with its assent, such trustee, receiver, administrator, committee, or guardian, with the consent of the guardian of the person of such minor: *Provided, however,* That no court or judge who is an owner of or in any manner financially interested in the stock or business of such corporation shall commit by order or decree to any such corporation any trust or fiduciary duty.

194. QUALIFICATIONS OF SUCH TRUSTEE, ETC. (SEC. 9.) That whenever any corporation operating under this act shall be appointed such trustee, executor, administrator, receiver, assignee, guardian, or committee as aforesaid, the president, vice-president, secretary, or treasurer of said company shall take the oath or affirmation now required by law to be made by any trustee, executor, receiver, assignee, guardian, or committee.

195. SECURITY FOR FAITHFUL PERFORMANCE OF TRUST. (SEC. 10.) That when any court shall appoint the said company a trustee, receiver, administrator, or such guardian, or committee, or shall order the deposit of money or other valuables with said company, or where any individual or corporation shall appoint any of said companies a trustee, executor, assignee, or such guardian, the capital stock of said company, subscribed for or taken, and all property owned by said company, together with the liability of the stockholders and officers as herein provided, shall be taken and considered as the security required by law for the faithful performance of its duties, and shall be absolutely liable in case of any default whatever.

196. PRIVILEGES EXTENDED TO EXISTING CORPORATIONS. (SEC. 11.) That any safe deposit company, trust company, surety or guaranty company, or title-insurance company now incorporated and operating under the laws of the United States or of the District of Columbia, or any of the States, and now doing business in said District, may avail itself of the provisions of this act on filing in the office of the recorder of deeds of the District of Columbia, or with the Comptroller of the Currency, a certificate of its intention to do so, which certificate shall specify which one of the three classes of business set out in section one it will carry on, and shall be verified by the oath of its president to the effect that it has in every respect complied with the requirements of existing law, especially with the provisions of this act; that its capital stock is paid in as provided in section twenty-one of this act and is not impaired, and thereafter such company may exercse all powers and perform all duties authorized by any one of the subdivisions of section one of this act in addition to the powers now lawfully exercised by such company.

197. REAL ESTATE. (SEC. 12.) That any company operating under this act may lease, purchase, hold, and convey real estate, not exceeding in value five hundred thousand dollars, and such in addition as it may acquire in satisfaction of debts due the corporation, under sales, decrees, judgments, and mortgages. But no such association shall hold the possession of any real estate under foreclosure of mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

198. PERIOD OF CORPORATIONS' EXISTENCE. (SEC. 13.) That the charters for incorporations named in this act may be made perpetual, or may be limited in time by their provisions, subject to the approval of Congress.

199. PROVISIONS RELATING TO CAPITAL STOCK. (SEC. 14.) That the capital stock of every such company shall be at least one million dollars, and at least fifty per centum thereof must have been paid in, in cash or by the transfer of assets as hereinafter provided in section twenty-one of this act, before any such company shall be entitled to transact business as a corporation, except with its own members, and before any company organized hereunder shall be entitled to transact the business of a trust company, or to become and act as an administrator, executor, guardian of the estate of a minor, or undertake any other kindred fiduciary duty, it shall deposit, either in money or in bonds, mortgages, deed of trust, or other securities equal in actual value to one-fourth of the capital stock paid in, with the Comptroller of the Currency, to be kept by him upon the trust and for the purposes hereinafter provided; and the said Comptroller may from time to time require an additional deposit from any such company, to be held upon and for the same trust and purposes, not exceeding, however, in value one-half the paid-in capital stock; and the said Comptroller shall not issue to any corporation the certificate heretofore provided for until said deposit with him of securities required by this section. Within one year after the organization of any corporation under the provisions of this act, or after any corporation heretofore existing shall have availed itself of the powers and rights given by this act in the manner herein provided for, its entire capital stock shall have been paid in.

200. ENFORCEMENT OF SUBSCRIPTIONS TO STOCK. (SEC. 15.) That the capital stock of every such company shall be divided into shares of one hundred dollars each. It shall be lawful for such company to call for and demand from the stockholders, respectively, all sums of money by them subscribed, at such time and in such proportions as its board of directors shall deem proper, within the time specified in section fourteen, and it may enforce payment by all remedies provided by law; and if any stockholder shall refuse or neglect to pay any installment as required by a resolution of the

board of directors, after thirty days' notice of the same, the said board of directors may sell at public auction, to the highest bidder, so many shares of said stock as shall pay said installment, under such general regulations as may be adopted in the by-laws of said company, and the highest bidder shall be taken to be the person who offers to purchase the least number of shares for the assessment due.

201. ANNUAL REPORT TO COMPTROLLER. (SEC. 16.) That every such company shall annually, within twenty days after the first of January of each year, make a report to the Comptroller of the Currency, which shall be published in a newspaper in the District, which shall state the amount of capital and of the proportion actually paid, the amount of debts, and the gross earnings for the year ending December thirty-first then next previous, together with their expenses, which report shall be signed by the president and a majority of the directors or trustees, and shall be verified by the oath of the president, secretary, and at least three of the directors or trustees.

202. TAX ON GROSS EARNINGS. (SEC. 16.) And said company shall pay to the District of Columbia, in lieu of personal taxes for each next ensuing year, one and a half per centum of its gross earnings for the preceding year, shown by said verified statement, which amount shall be payable to the collector of taxes at the times and in the manner that other taxes are payable.

203. LIABILITY FOR FAILURE TO REPORT. (SEC. 17.) That if any company fails to comply with the provisions of the preceding section, all the directors or trustees of such company shall be jointly and severally liable for the debts of the company then existing, and for all that shall be contracted before such report shall be made: *Provided*, That in case of failure of the company in any year to comply with the provisions of section sixteen of this act, and any of the directors shall, on or before January fifteenth of such year, file his written request for such compliance with the secretary of the company, the Comptroller of the Currency, and the recorder of deeds of the District of Columbia, such director shall be exempt from the liability prescribed in this section.

204. PERJURY AND LARCENY. (SEC. 18.) That any willful false swearing in regard to any certificate or report or public

notice required by the provisions of this act shall be perjury, and shall be punished as such according to the laws of the District of Columbia. And any misappropriation of any of the money of any corporation or company formed under this act, or any money, funds, or property intrusted to it, shall be held to be larceny, and shall be punished as such under the laws of said District.

205. TRANSFER OF STOCK. (SEC. 19.) That the stock of such company shall be deemed personal estate, and shall be transferable only on the books of such company in such manner as shall be prescribed by the by-laws of the company; but no shares shall be transferable until all previous calls thereon shall have been fully paid, and the said stock shall not be taxable, in the hands of individual owners, the tax on the capital stock, gross earnings of the company hereinbefore provided being in lieu of other personal tax. All certificates of the stock of any company organized under this act shall show upon their face the par value of each share and the amount paid thereon.

206. LIABILITY OF STOCKHOLDERS. (SEC. 20.) That all stockholders of every company incorporated under this act, or availing itself of its provisions under section eleven, shall be severally and individually liable to the creditors of such company to an amount equal to and in addition to the amount of stock held by them, respectively, for all debts and contracts made by such company.

207. MONEY PAYMENT OF CAPITAL STOCK REQUIRED. (SEC. 21.) That nothing but money shall be considered as payment of any part of the capital stock, except that in the case of any company now doing business in the District of Columbia in any of the classes herein provided for, or under any act of Congress or by virtue of the laws of any of the States, and which company has actually received full payment in money of at least fifty per centum of the capital stock required by this act and which company desires to obtain a charter under this act, all the assets or property may be received and considered as money, at a value to be appraised and fixed by the Comptroller of the Currency: *Provided*, That all such assets and property are also transferred to and are thereafter owned by the company organized under this act.

208. NUMBER AND ELECTION OF DIRECTORS. (SEC. 22.) That the stock, property, and concerns of such company shall

be managed by not less than nine nor more than thirty directors or trustees, who shall, respectively, be stockholders and at least one-half residents and citizens of the District of Columbia, and shall, except the first year, be annually elected by the stockholders at such time and place and after such published notice as shall be determined by the by-laws of the company, and said directors or trustees shall hold until their successors are elected and qualified.

209. APPOINTMENT OF OFFICERS. (SEC. 23.) That there shall be a president of the company, who shall be a director, also a secretary and a treasurer, all of whom shall be chosen by the directors or trustees: *Provided*, That only one of the above-named officers shall be held by the same person at the same time. Subordinate officers may be appointed by the directors or trustees, and all such officers may be required to give such security for the faithful performance of the duties of their office as the directors or trustees may require.

210. BY-LAWS. (SEC. 24.) That the directors or trustees shall have power to make such by-laws as they deem proper for the management or disposal of the stock and business affairs of such company, not inconsistent with the provisions of this act, and prescribing the duties of officers and servants that may be employed, for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of such company.

211. DIRECTORS LIABLE FOR PAYMENT OF UNEARNED DIVIDENDS. (SEC. 25.) That if the directors or trustees of any company shall declare or pay any dividend, the payment of which would render it insolvent, or which would create a debt against such company, they shall be jointly and severally liable as guarantors for all of the debts of the company then existing, and for all that shall be thereafter contracted, while they shall, respectively, remain in office.

212. DIRECTORS' LIABILITY MAY BE AVOIDED. (SEC. 26.) That if any of the directors or trustees shall object to declaring of such dividend or the payment of the same, and shall at any time before the time fixed for the payment thereof file a certificate of their objection in writing with the secretary of the company and with the recorder of deeds of the District

they shall be exempt from liability prescribed in the preceding section.

213. RESPONSIBILITY OF DIRECTORS FOR EXCESS LIABILITIES. (SEC. 27.) That if the liabilities of any company shall at any time exceed the amount of the fair cash value of the assets, the directors or trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company after the additional liability of the stockholders has been enforced.

214. TRUSTEE, ETC., NOT LIABLE ON STOCK ASSESSMENT. (SEC. 28.) That no person holding stock in such company as executor, administrator, guardian, or trustee shall be personally subject to any liability as stockholder of such company, but the estate and funds in the hands of such executor, administrator, guardian, or trustee shall be liable in like manner and to the same extent as the testator or intestate or the ward or the person interested in such trust fund would have been if he had been living and competent to act and hold the stock in his own name.

215. INCREASE OF CAPITAL. (SEC. 29.) That any corporation which may be formed under this chapter may increase its capital stock by complying with the provisions of this chapter to any amount which may be deemed sufficient and proper for the purposes of the corporation.

216. CERTIFIED COPY OF INCORPORATION CERTIFICATE COMPETENT EVIDENCE. (SEC. 30.) That a copy of any certificate of incorporation filed in pursuance of this chapter, certified by the recorder of deeds to be a true copy and the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the facts therein stated.

217. NO BOND OR OTHER SECURITY REQUIRED OF TRUST COMPANIES. (SEC. 31.) That no bond or other collateral security, except as hereinafter stated, shall be required from any trust company incorporated under this act for or in respect to any trust, nor when appointed trustee, guardian, receiver, executor, or administrator, with or without the will annexed, committee of the estate of a lunatic or idiot, or other fiduciary appointment; but the capital stock subscribed for or taken, and all property owned by said company and the amount for which said stockholders shall be liable in excess of their stock,

shall be taken and considered as the security required by law for the faithful performance of its duties and shall be absolutely liable in case of any default whatever; and in case of the insolvency or dissolution of said company the debts due from the said company as trustee, guardian, receiver, executor, or administrator, committee of the estate of lunatics, idiots, or any other fiduciary appointment, shall have a preference.

218. DISTRICT SUPREME COURT HAS JURISDICTION OF TRUST COMPANIES. (SEC. 32.) That the supreme court of the District of Columbia, or any justice thereof, shall have power to make orders respecting such company whenever it shall have been appointed trustee, guardian, receiver, executor, or administrator, with or without the will annexed, committee of the estate of a lunatic, idiot, or any other fiduciary, and require the said company to render all accounts which might lawfully be made or required by any court or any justice thereof if such trustee, guardian, receiver, executor, administrator, with or without the will annexed, committee of the estate of a lunatic or idiot, or fiduciary were a natural person. And said court, or any justice thereof, at any time, on application of any person interested, may appoint some suitable person to examine into the affairs and standing of such companies, who shall make a full report thereof to the court, and said court, or any justice thereof, may at any time, in its discretion, require of said company a bond with sureties or other securities for the faithful performance of its obligations, and such sureties or other security shall be liable to the same extent and in the same manner as if given or pledged by a natural person.

219. ALL SIMILAR DISTRICT CORPORATIONS SUBJECT TO THIS ACT. (SEC. 33.) That no corporation or company organized by virtue of the laws of any of the States of this Union and having its principal place of business within the District of Columbia, shall carry on, in the District of Columbia, any of the kinds of business named in this act without strict compliance in all particulars with the provisions of this act for the government of such corporations formed under it, and each one of the officers of the corporation or company so offending shall be punished by fine not exceeding one thousand dollars, or imprisonment in some State's prison not exceeding one year, or by both fine and imprisonment, in the discretion

of the court. This section shall not take effect till six months after the approval of this act.

220. PROVISIONS FOR AMENDMENT. (SEC. 34.) That Congress may at any time alter, amend, or repeal this act, but any such amendment or repeal shall not, nor shall the dissolution of any company formed under this act, take away or impair any remedy given against such corporation, its stockholders or officers, for any liability or penalty which shall have been previously incurred: *Provided*, That the courts of the District of Columbia shall not have power to appoint any trustee, trustees, guardians, receivers, or other trustee of a fund or property located outside of the District of Columbia, or belonging to a corporation or person having a legal residence or location outside of said District.

GOVERNMENT DEPOSITARIES.

221. DESIGNATION AND DUTIES OF PUBLIC DEPOSITARIES. (SEC. 5153.) All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositories of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued,

which have been paid into the Government for internal revenue, or for loans or stocks.

222. DEPOSIT AND WITHDRAWAL OF PUBLIC MONEYS. (SEC. 3620.) It shall be the duty of every disbursing officer having any public money intrusted to him for disbursement to deposit the same with the Treasurer or some one of the assistant treasurer of the United States, and to draw for the same only as it may be required for payments to be made by him in pursuance of law; and draw from the same only in favor of the persons to whom payment is made, and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasurer or an assistant treasurer of the United States. In place, however, where there is no Treasurer or assistant treasurer, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or, in writing, authorize the same to be kept in any other manner and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors.

223. PROVISIONS FOR DEPOSITS BY CERTAIN POSTMASTERS. (SEC. 3847.) Any postmaster, having public money belonging to the Government, at an office within a county where there are no designated depositaries, treasurers of mints, or Treasurer or assistant treasurers of the United States, may deposit the same, at his own risk and in his official capacity, in any national bank in the town, city, or county where the said postmaster resides; but no authority or permission is or shall be given for the demand or receipt by the postmaster, or any other person, of interest, directly or indirectly, on any deposit made as herein described; and every postmaster who makes any such deposit shall report quartely to the Postmaster-General the name of the bank where such deposits have been made, and also state the amount which may stand at the time to his credit.

224. PENALTY FOR MISAPPLICATION OF MONEY-ORDER FUNDS. (SEC. 4046.) Every postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money-order office who converts to his own use, in any way whatever, or loans, or deposits in any bank,

except as authorized by this Title, or exchanges for other funds, any portion of the money-order funds, shall be deemed guilty of embezzlement, and any such person, as well as every other person advising or participating therein, shall, for every such offense, be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled; and any failure to pay over or produce any money-order funds intrusted to such person shall be taken to be prima facie evidence of embezzlement: and upon the trial of any indictment against any person for such embezzlement it shall be prima facie evidence of a balance against him to produce a transcript from the money-order account books of the Sixth Auditor. But nothing herein contained shall be construed to prohibit any postmaster depositing, under the direction of the Postmaster-General, in a national bank designated by the Secretary of the Treasury for that purpose, to his own credit as postmaster, any money-order or other funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such bank, or through United States disbursing officer, or otherwise, when instructed or required to do so by the Postmaster-General for the purpose of remitting surplus money-order funds from one post-office to another, to be used in payment of money orders. Disbursing officers of the United States shall issue, under regulations to be prescribed by the Secretary of the Treasury, duplicates of lost checks drawn by them in favor of any postmaster on account of money-order or other public funds received by them from some other postmaster.

225. PENALTY FOR UNAUTHORIZED DEPOSIT OF PUBLIC MONEY. (SEC. 5488.) Every disbursing officer of the United States who deposits any public money instrusted to him in any place or in any manner, except as authorized by law, or converts to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the Treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied; and shall be punished by

imprisonment with hard labor for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment.

226. PENALTY FOR UNAUTHORIZED RECEIPT OR USE OF PUBLIC MONEY. (SEC. 5497.) Every banker, broker, or other person not an authorized depositary of public moneys, who knowingly receives from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or who uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose not prescribed by law, and every president, cashier, teller, director, or other officer of any bank or banking association, who violates any of the provisions of this section, is guilty of an act of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be punished as prescribed in section fifty-four hundred and eighty-eight.

MISCELLANEOUS

227. LEGAL TENDER AND LAWFUL MONEY.— The following statement concerning the legal-tender properties of money of the United States is based upon United States Revised Statutes, sections 3585, 3586, 3587, 3588, 3589, and 3590, and the acts amendatory thereof and additional thereto:

Gold coin, standard silver dollars, subsidiary silver, minor coins, United States notes, and Treasury notes of 1890 have the legal-tender quality as follows: Gold coin is legal tender for its nominal value when not below the limit of tolerance in weight; when below that limit it is legal tender in proportion to its weight; standard silver dollars and Treasury notes of 1890 are legal tender for all debts, public and private, except where otherwise expressly stipulated in the contract; subsidiary silver is legal tender to the extent of $10, minor coins to the extent of 25 cents, and United States notes for all debts, public and private, except duties on imports and interest on the public debt. Gold certificates, silver certificates, and national-bank notes are nonlegal-tender money. Both kinds of certifi-

cates, however, are receivable for all public dues, and national-bank notes are receivable for all public dues except duties on imports, and may be paid out for all public dues, except interest on the public debt.

The term "lawful money" is understood to apply to every form of money which is endowed by law with the legal-tender quality. (See Opinions of Attorneys-General, vol. 17, p. 123.)

228. MISCELLANEOUS ACTS.—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That The First National Bank of Annapolis, now located in the city of Annapolis and State of Maryland, is hereby authorized to change its location to the city of Baltimore, in said State. Whenever the stockholders representing three-fourths of the capital of said bank, at a meeting called for that purpose, determine to make such change, the president and cashier shall execute a certificate, under the corporate seal of the bank, specifying such determination, and shall cause the same to be recorded in the office of the Comptroller of the Currency, and thereupon such change of location shall be effected, and the operations of discount and deposit of said bank shall be carried on in the city of Baltimore.

SEC. 2. That nothing in this act contained shall be so construed as in any manner to release the said bank from any liability or affect any action or proceeding in law in which the said bank may be a party or interested. And when such change shall have been determined upon, as aforesaid, notice thereof, and of such change, shall be published in two weekly papers in the city of Annapolis not less than four weeks.

SEC. 3. That whenever the location of said bank shall have been changed from the city of Annapolis to the city of Baltimore, in accordance with the first section of this act, its name shall be changed to The Traders' National Bank of Baltimore, if the board of directors of said bank shall accept the new name by resolution of the board, and cause a copy of such resolution, duly authenticated, to be filed with the Comptroller of the Currency.

SEC. 4. That all the debts, demands, liabilities, rights, privileges, and powers of The First National Bank of Annapolis shall devolve upon The Traders' National Bank of Baltimore whenever such change of name is effected.

SEC. 5. That this act shall take effect and be in force from and after its passage.

Approved, June 7, 1872.

Acts of a similar nature to the one preceding have been enacted by Congress for the following purposes:

Authorizing The Manufacturers' National Bank of New York to change its location from the city of New York to the city of Brooklyn. (Approved July 27, 1868.)

Authorizing The City National Bank of New Orleans, Louisiana, to change its name to The Germania National Bank of New Orleans. (Approved March 1, 1869.)

Authorizing The Second National Bank of Plattsburgh, New York, to change its name to The Vilas National Bank of Plattsburgh. (Approved March 1, 1869.)

Authorizing The First National Bank of Delhi, New York, to change its location and name to The First National Bank of Port Jervis, New York. (Approved May 5, 1870.)

Authorizing The First National Bank of Fort Smith, Arkansas, to change its location and name to the First National Bank of Camden, Arkansas. (Approved July 1, 1870.)

Authorizing the Jersey Shore National Bank, Pennsylvania, to change its location and name to The Williamsport National Bank, Pennsylvania. (Approved December 22, 1870.)

Authorizing the Worcester County National Bank of Blackstone, Massachusetts, to change its location and name to The Franklin National Bank, Massachusetts. (Approved February 9, 1871.)

Authorizing The Farmers' National Bank of Fort Edward, New York, to change its location and name to The North Granville National Bank, New York. (Approved February 18, 1871.)

Authorizing The Worthington National Bank of Cooperstown, New York, to change its location and name to The First National Bank of Oneonta, New York. (Approved February 27, 1871.)

Authorizing The Warren National Bank of South Danvers, Massachusetts, to change its name to The Warren National Bank of Peabody, Massachusetts. (Approved March 12, 1872.)

Authorizing the First National Bank of Seneca, Illinois, to

change its location and name to The First National Bank of Morris, Illinois. (Two acts, approved April 5, 1872, and June 18, 1874.)

Authorizing The Railroad National Bank of Lowell, Massachusetts, to change its location and name to The Railroad National Bank of Boston, Massachusetts. (Approved May 31, 1872.)

Authorizing The National Bank of Lyons, Michigan, to change its location and name to The Second National Bank of Ionia, Michigan. (Approved December 24, 1872.)

Authorizing The East Chester National Bank of Mount Vernon, New York, to change its location and name to The German National Bank of Evansville, Indiana. (Approved January 11, 1873.)

Authorizing The First National Bank of Newnan, Georgia, to change its location and name to The National Bank of Commerce, Atlanta, Georgia. (Approved January 23, 1873.)

Authorizing The First National Bank of Watkins, New York, to change its location and name to The First National Bank of Penn Yan, New York. (Approved February 19, 1873.)

Authorizing The National Bank of Springfield, Missouri, to change its name to The First National Bank of Springfield, Missouri. (Approved March 3, 1873.)

Authorizing The Kansas Valley National Bank of Topeka, Kansas, to change its name to The First National Bank of Topeka, Kansas. (Approved March 3, 1873.)

Authorizing The First National Bank of Saint Anthony, Minnesota, to change its location and name to The Merchants' National Bank of Minneapolis, Minnesota. (Approved January 8, 1874.)

Authorizing The Second National Bank of Havana, New York, to change its name to The Havana National Bank of Havana, New York. (Approved January 9, 1874.)

Authorizing The Passaic County National Bank of Paterson, New Jersey, to change its name to The Second National Bank of Paterson, New Jersey. (Approved April 15, 1874.)

Authorizing The Citizens' National Bank of Hagerstown, Maryland, to change its location and name to The Citizens'

National Bank of Washington City, District of Columbia. (Approved May 1, 1874.)

Authorizing The Irasburg National Bank of Orleans, at Irasburg, Vermont, to change its location and name to The Barton National Bank, Vermont. (Approved June 3, 1874.)

Authorizing The Farmers' National Bank of Greensburg, Pennsylvania, to change its location and name to The Fifth National Bank of Pittsburg, Pennsylvania. (Approved June 23, 1874.)

Authorizing The Citizens' National Bank of Sanbornton, New Hampshire, to change its name to The Citizens' National Bank of Tilton, New Hampshire. (Approved February 19, 1875.)

Authorizing The Second National Bank of Jamestown, New York, to change its name to The City National Bank of Jamestown, New York. (Approved March 3, 1875.)

Authorizing The Second National Bank of Watkins, New York, to change its name to The Watkins National Bank, New York. (Approved March 3, 1875.)

Authorizing The Slater National Bank of North Providence, Rhode Island, to change its name to The Slater National Bank of Pawtucket, Rhode Island. (Approved March 3, 1875.)

Authorizing The Auburn City National Bank of Auburn, New York, to be consolidated with The First National Bank of Auburn, New York. (Approved March 3, 1875.)

Authorizing The Miners' National Bank of Braidwood, Illinois, to change its location and name to The Commercial National Bank of Wilmington, Illinois. (Approved January 31, 1878.)

Authorizing The Windham National Bank, Windham, Connecticut, to change its location to the village of Willimantic, Connecticut. (Approved February 10, 1879.)

Authorizing The National Bank of Commerce of Cincinnati, Ohio, to change its name to The National Lafayette and Bank of Commerce. (Approved April 29, 1879.)

Authorizing The City National Bank of Manchester, New Hampshire, to change its name to The Merchants' National Bank of Manchester. (Approved June 11, 1880.)

Authorizing The Blue Hill National Bank of Dorchester, Massachusetts, to change its location and name to The Blue

Hill National Bank of Milton, Massachusetts. (Approved January 13, 1881.)

Authorizing The First National Bank of Meriden, West Meriden, Connecticut, to change its name to The First National Bank of Meriden, Connecticut. (Approved March 1, 1881.)

Authorizing The National Mechanics' Banking Association of New York, New York, to change its name to Wall Street National Bank. (Approved February 14, 1882.)

Authorizing The Lancaster National Bank of Lancaster, Massachusetts, to change its location and name to The Lancaster National Bank of Clinton, Massachusetts. (Approved February 25, 1882.)

Authorizing The National Bank of Kutztown, Pennsylvania, to change its location and name to The Keystone National Bank of Reading, Pennsylvania. (Approved June 27, 1882.)

Joint resolution authorizing The National Bank of Winterset, Iowa, to change its name to The First National Bank of Winterset, Iowa. (Approved January 18, 1883.)

Authorizing The Second National Bank of Xenia, Ohio, to increase its capital stock. (Approved February 17, 1883.)

Authorizing The First National Bank of West Greenville, Pennsylvania, to change its name to The First National Bank of Greenville, Pennsylvania. (Approved February 26, 1883.)

Authorizing The West Waterville National Bank of Oakland, Maine, to change its title to The Messalonskee National Bank of Oakland, Maine. (Approved April 15, 1884.)

Authorizing The Hillsborough National Bank, Ohio, to change its name to The First National Bank of Hillsborough, Ohio. (Approved December 18, 1884.)

Authorizing The Slater National Bank of North Providence, Rhode Island, to change its name. (Approved January 8, 1885.)

Authorizing The First National Bank of Omaha Nebraska, to increase its capital stock. (Approved January 10, 1885.)

Authorizing The National Bank of Bloomington, Illinois, to change its name to the First National Bank of Bloomington, Illinois. (Approved January 27, 1885.)

Authorizing The Manufacturers' National Bank of New York to change its name to The Manufacturers' National Bank of Brooklyn, New York. (Approved February 20, 1885.)

Authorizing The Commercial National Bank of Chicago, Illinois, to increase its capital stock. (Approved February 28, 1885.)

Authorizing The First National Bank of Larned, Kansas, to increase its capital stock. (Approved March 3, 1885.)

Authorizing The First National Bank of Fort Benton, Montana, to change its location and name. (Approved December 18, 1890.)

Authorizing The National Safe Deposit Company, of Washington, to change its title to "The National Safe Deposit Savings and Trust Company of the District of Columbia." (Approved February 18, 1892.)

Authorizing a national bank at Chicago, Illinois, to establish a branch office upon the grounds of the World's Columbian Exposition. (Approved May 12, 1892.)

Authorizing The First National Bank of Sprague, Washington, to change its location and name. (Approved March 20, 1896.)

Authorizing the Interstate National Bank, of Kansas City, Kansas, to change its location. (Approved March 2, 1897.)

Authorizing any bank or trust company located in the State of Missouri to conduct a banking office on the Louisiana Exposition grounds at St. Louis, Mo. (Approved March 3, 1901.)

CURRENCY ACT, APPROVED MARCH 14, 1900.

An Act To define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine, as established by section thirty-five hundred and eleven of the Revised Statutes of the United States, shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity.

SEC. 2. That United States notes, and Treasury notes issued under the Act of July fourteenth, eighteen hundred and ninety, when presented to the Treasury for redemption, shall be re-

deemed in gold coin of the standard fixed in the first section of this Act, and in order to secure the prompt and certain redemption of such notes as herein provided it shall be the duty of the Secretary of the Treasury to set apart in the Treasury a reserve fund of one hundred and fifty million dollars in gold coin and bullion, which fund shall be used for such redemption purposes only, and whenever and as often as any of said notes shall be redeemed from said fund it shall be the duty of the Secretary of the Treasury to use said notes so redeemed to restore and maintain such reserve fund in the manner following, to wit: First, by exchanging the notes so redeemed for any gold coin in the general fund of the Treasury; second, by accepting deposits of gold coin at the Treasury or at any subtreasury in exchange for the United States notes so redeemed; third, by procuring gold coin by the use of said notes in accordance with the provisions of section thirty-seven hundred of the Revised Statutes of the United States. If the Secretary of the Treasury is unable to restore and maintain the gold coin in the reserve fund by the foregoing methods, and the amount of such gold coin and bullion in said fund shall at any time fall below one hundred million dollars, then it shall be his duty to restore the same to the maximum sum of one hundred and fifty million dollars by borrowing money on the credit of the United States, and for the debt thus incurred to issue and sell coupon or registered bonds of the United States, in such form as he may prescribe, in denominations of fifty dollars or any multiple thereof, bearing interest at the rate of not exceeding three per centum per annum, payable quarterly, such bonds to be payable at the pleasure of the United States after one year from the date of their issue, and to be payable, principal and interest, in gold coin of the present standard value, and to be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority; and the gold coin received from the sale of said bonds shall first be covered into the general fund of the Treasury and then exchanged, in the manner hereinbefore provided, for an equal amount of the notes redeemed and held for exchange, and the Secretary of the Treasury may, in his discretion, use said notes in exchange for gold, or to purchase or redeem any bonds

of the United States, or for any other lawful purpose the public interests may require, except that they shall not be used to meet deficiencies in the current revenues. That United States notes when redeemed in accordance with the provisions of this section shall be reissued, but shall be held in the reserve fund until exchanged for gold, as herein provided; and the gold coin and bullion in the reserve fund, together with the redeemed notes held for use as provided in this section, shall at no time exceed the maximum sum of one hundred and fifty million dollars.

SEC. 3. That nothing contained in this Act shall be construed to affect the legal-tender quality as now provided by law of the silver dollar, or of any other money coined or issued by the United States.

SEC. 4. That there be established in the Treasury Department, as a part of the office of the Treasurer of the United States, divisions to be designated and known as the division of issue and the division of redemption, to which shall be assigned, respectively, under such regulations as the Secretary of the Treasury may approve, all records and accounts relating to the issue and redemption of United States notes, gold certificates, silver certificates, and currency certificates. There shall be transferred from the accounts of the general fund of the Treasury of the United States, and taken up on the books of said divisions, respectively, accounts relating to the reserve fund for the redemption of United States notes and Treasury notes, the gold coin held against outstanding gold certificates, the United States notes held against outstanding currency certificates, and the silver dollars held against outstanding silver certificates, and each of the funds represented by these accounts shall be used for the redemption of the notes and certificates for which they are respectively pledged, and shall be used for no other purpose, the same being held as trust funds.

SEC. 5. That it shall be the duty of the Secretary of the Treasury, as fast as standard silver dollars are coined under the provisions of the Acts of July fourteenth, eighteen hundred and ninety, and June thirteenth, eighteen hundred and ninety-eight, from bullion purchased under the act of July fourteenth, eighteen hundred and ninety, to retire and cancel an equal amount of Treasury notes whenever received into the Treasury, either by exchange in accordance with the provisions of this Act

or in the ordinary course of business, and upon the cancellation of Treasury notes silver certificates shall be issued against the silver dollars so coined.

SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer or any assistant treasurer of the United States in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than twenty dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any national banking association may be counted as a part of its lawful reserve: *Provided*, That whenever and so long as the gold coin held in the reserve fund in the Treasury for the redemption of United States notes and Treasury notes shall fall and remain below one hundred million dollars the authority to issue certificates as herein provided shall be suspended: *And provided further*, That whenever and so long as the aggregate amount of United States notes and silver certificates in the general fund of the Treasury shall exceed sixty million dollars the Secretary of the Treasury may, in his discretion, suspend the issue of the certificates herein provided for: *And provided further*, That of the amount of such outstanding certificates one-fourth at least shall be in denominations of fifty dollars or less: *And provided further*, That the Secretary of the Treasury may, in his discretion, issue such certificates in denominations of ten thousand dollars, payable to order. And section fifty-one hundred and ninety-three of the Revised Statutes of the United States is hereby repealed.

SEC. 7. That hereafter silver certificates shall be issued only of denominations of ten dollars and under, except that not exceeding in the aggregate ten per centum of the total volume of said certificates, in the discretion of the Secretary of the Treasury, may be issued in denominations of twenty dollars, fifty dollars, and one hundred dollars; and silver certificates of higher denomination than ten dollars, except as herein provided, shall, whenever received at the Treasury or redeemed, be retired and canceled, and certificates of denominations of ten dollars or less shall be substituted therefor, and after such

substitution, in whole or in part, a like volume of United States notes of less denomination than ten dollars shall from time to time be retired and canceled, and notes of denominations of ten dollars and upward shall be reissued in substitution therefor, with like qualities and restrictions as those retired and canceled.

SEC. 8. That the Secretary of the Treasury is hereby authorized to use, at his discretion, any silver bullion in the Treasury of the United States purchased under the Act of July fourteenth, eighteen hundred and ninety, for coinage into such denominations of subsidiary silver coin as may be necessary to meet the public requirements for such coin: *Provided*, That the amount of subsidiary silver coin outstanding shall not at any time exceed in the aggregate one hundred millions of dollars. Whenever any silver bullion purchased under the Act of July fourteenth, eighteen hundred and ninety, shall be used in the coinage of subsidiary silver coin, an amount of Treasury notes issued under said Act equal to the cost of the bullion contained in such coin shall be canceled and not reissued.

SEC. 9. That the Secretary of the Treasury is hereby authorized and directed to cause all worn and uncurrent subsidiary silver coin of the United States now in the Treasury, and hereafter received, to be recoined, and to reimburse the Treasurer of the United States for the difference between the nominal or face value of such coin and the amount the same will produce in new coin from any moneys in the Treasury not otherwise appropriated.

SEC. 10. That section fifty-one hundred and thirty-eight of the Revised Statutes is hereby amended so as to read as follows:

"Section 5138. No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secertary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the

population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars."

SEC. 11. That the Secretary of the Treasury is hereby authorized to receive at the Treasury any of the outstanding bonds of the United States bearing interest at five per centum per annum, payable February first, nineteen hundred and four, and any bonds of the United States bearing interest at four per centum per annum, payable July first, nineteen hundred and seven, and any bonds of the United States bearing interest at three per centum per annum, payable August first, nineteen hundred and eight, and to issue in exchange therefor an equal amount of coupon or registered bonds of the United States in such form as he may prescribe, in denominations of fifty dollars or any multiple thereof, bearing interest at the rate of two per centum per annum, payable quarterly, such bonds to be payable at the pleasure of the United States after thirty years from the date of their issue, and said bonds to be payable, principal and interest, in gold coin of the present standard value, and to be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority: *Provided*, That such outstanding bonds may be received in exchange at a valuation not greater than their present worth to yield an income of two and one-quarter per centum per annum; and in consideration of the reduction of interest effected, the Secretary of the Treasury is authorized to pay to the holders of the outstanding bonds surrendered for exchange, out of any money in the Treasury not otherwise appropriated, a sum not greater than the difference between their present worth, computed as aforesaid, and their par value, and the payments to be made hereunder shall be held to be payments on account of the sinking fund created by section thirty-six hundred and ninety-four of the Revised Statutes: *And provided further*, That the two per centum bonds to be issued under the provisions of this Act shall be issued at not less than par, and they shall be numbered consecutively in the order of their issue, and when payment is made the last numbers issued shall be first paid, and this order shall be followed until all the bonds are paid, and whenever any of the outstanding bonds are called for payment interest thereon shall cease three

months after such call; and there is hereby appropriated out of any money in the Treasury not otherwise appropriated, to effect the exchanges of bonds provided for in this Act, a sum not exceeding one-fifteenth of one per centum of the face value of said bonds, to pay the expense of preparing and issuing the same and other expenses incident thereto.

SEC. 12. That upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; and any national banking association now having bonds on deposit for the security of circulating notes, and upon which an amount of circulating notes has been issued less than the par value of the bonds, shall be entitled, upon due application to the Comptroller of the Currency, to receive additional circulating notes in blank to an amount which will increase the circulating notes held by such association to the par value of the bonds deposited, such additional notes to be held and treated in the same way as circulating notes of national banking associations heretofore issued, and subject to all the provisions of law affecting such notes: *Provided*, That nothing herein contained shall be construed to modify or repeal the provisions of section fifty-one hundred and sixty-seven of the Revised Statutes of the United States, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security: *And provided further*, That the circulating notes furnished to national banking associations under the provisions of this Act shall be of the denominations prescribed by law, except that no national banking association shall, after the passage of this Act, be entitled to receive from the Comptroller of the Currency, or to issue or reissue or place in circulation, more than one-third in amount of its circulating notes of the denomination of five dollars: *And provided further*, That the total amount of such notes issued to any such association may equal

at any time but shall not exceed the amount at such time of its capital stock actually paid in: *And provided further*, That under regulations to be prescribed by the Secretary of the Treasury any national banking association may substitute the two per centum bonds issued under the provisions of this Act for any of the bonds deposited with the Treasurer to secure circulation or to secure deposits of public money; and so much of an Act entitled "An Act to enable national banking associations to extend their corporate existence, and for other purposes," approved July twelfth, eighteen hundred and eighty-two, as prohibits any national bank which makes any deposit of lawful money in order to withdraw its circulating notes from receiving any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid, is hereby repealed, and all other Acts or parts of Acts inconsistent with the provisions of this section are hereby repealed.

SEC. 13. That every national banking association having on deposit, as provided by law, bonds of the United States bearing interest at the rate of two per centum per annum, issued under the provisions of this Act, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said two per centum bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of the Revised Statutes.

SEC. 14. That the provisions of this Act are not intended to preclude the accomplishment of international bimetallism whenever conditions shall make it expedient and practicable to secure the same by concurrent action of the leading commercial nations of the world and at a ratio which shall insure permanence of relative value between gold and silver.

FAILED NATIONAL BANKS, ETC.

Provisos, act April 28, 1902.

Provided, That for the fiscal year of nineteen hundred and two and thereafter, a full and complete list of all officers, agents, clerks, and other employees of the office of the Comptroller of

the Currency, including bank examiners, receivers and attorneys for receivers, and clerks employed by such examiners and receivers, or any person connected with the work of said office in Washington or elsewhere, whose salary or compensation is paid from the Treasury of the United States or assessed against or collected from existing or failed banks under their supervision or control, shall be transmitted to the Secretary of the Interior in accordance with the provisions of an Act of Congress approved January twelfth, eighteen hundred and eighty-five, relating to the Official Register: *And provided further,* That the Comptroller of the Currency is hereby directed to include in his Annual Report to the Speaker of the House of Representatives, expenses incurred during each year, in liquidation of each failed national bank separately.

INSTRUCTIONS AND SUGGESTIONS RELATING TO THE ORGANIZATION OF NATIONAL BANKS.

[NOTE.— The following are forms and suggestions prepared and recommended by the Comptroller of the Currency, in the organization and formation of National Banks.]

ORGANIZATION.

The preliminary proceeding in connection with the organization of a national bank is to make an application to the Comptroller of the Currency, stating the desired title, the location, and the proposed capital. The application must be signed by at least five persons who contemplate being stockholders of the association. (Section 5133, United States Revised Statutes.) The application should contain a statement as to the business and financial standing of the signers and an indorsement by a United States Senator, Representative, judge of court, or other prominent public official, personally acquainted with the applicants, in relation to their character and financial responsibility.

The following is a copy of the formal application for reservation of title and authority to organize a national bank. Copies of this form will be furnished on request.

APPLICATION TO ORGANIZE A NATIONAL BANK.

The name of the place should form a part of the title, thus "The First National Bank of A———," but the name of the State should not be included.

Consideration will not be given to an application for a title including the word "First," if a national bank exists or has existed at the given locality; nor to an application for a title identical with that of a national bank heretofore in existence, nor to one materially similar to that of a national, State, or other bank existing in the place.

——— ———, 190—.

To the Comptroller of the Currency,

Washington.

Sir: Notice is hereby given that we, the undersigned, being natural persons, and of lawful age, intend, with others, to organize a national banking association, under the title of "The ——— ———," to be located at ——— ———, county of ———, State of ———, with capital of $ ———, to succeed the ——— ——— bank of ———. Population ———.

We request that the title be reserved for a period of sixty days and the necessary organization papers and instructions sent to ——— ———, at ——— ———.

(This application must be signed by at least five prospective shareholders, and indorsed as indicated.)

Signatures of Applicants.	Residences.	Business.	Financial Strength in Figures.

The signers of this application are known to me to be reputable citizens, and the foregoing information in reference to their business and financial standing is, in my opinion, correct.

[a] ——— ———,
——— ———.

If the application receives the approval of the Comptroller, he will furnish all necessary blank forms for completing the organization, with instructions for their proper execution, and the title applied for will be reserved for a period of sixty days, during which time it is expected that the organization of the bank will be completed.

CAPITAL REQUIRED.

National banks with a minimum capital of $25,000 may be organized in places the population of which does not exceed 3,000; with minimum capital of $50,000 in places the population of which does not exceed 6,000; with minimum capital of $100,000 in places the population of which does not exceed 50,000, and with minimum capital of $200,000 in places with population of over 50,000.

[a] Signature of member of Congress, judge of court, or other prominent official.

STOCK SUBSCRIPTION LIST.

The law does not provide for the filing with the Comptroller of the Currency of a list of subscribers to the capital stock of a national banking association, nor are blanks for that purpose furnished by this office. When, however, the proposed incorporators have received advice of the approval of their application to organize, there may be properly drawn up a subscription contract, and signatures of the prospective stockholders obtained. The law only requires that the capital stock of a national bank shall be paid in cash at par, and permits it to be paid in installments. There would appear, however, to be no objection to the incorporation in the subscription contract of a provision that the entire amount due on each share shall be paid at the call of the directors; also, that a premium shall be paid for the stock to be credited to the surplus fund. Where the stock is sold at a premium of 20 per cent, a bank is enabled at the first dividend period to distribute the net earnings without the carrying of any portion thereof to the surplus fund as provided by section 5199, United States Revised Statutes.

In case subscriptions to stock are paid in installments, temporary certificates should be issued, and the amount of each payment credited thereon. When all installments have been paid, the temporary certificates should be surrendered and canceled and certificates of stock issued in lieu thereof.

The following is a form of temporary certificate in general use:

TEMPORARY CERTIFICATE.

No. ——. —— Shares.

This is to certify that ——— is entitled to ——— shares of the capital stock of the ——— National Bank of ———, capital $——, and that upon payment of all installments, amounting to $——, and surrender of this temporary certificate, a certificate of stock will be issued.

Witness the seal and the signatures of the president and cashier of the bank,

Dated ———, 190—.

The ——— National Bank of ———.

By ——— ———, ——— ——— ———,
Cashier. President.

PAYMENTS ON ACCOUNT OF CAPITAL.

First installment,	——	per cent,	amounting to	$——,	paid	——,	190—.
Second	"	——	"	"	——	"	—— 190—.
Third	"	——	"	"	——	"	—— 190—.
Fourth	"	——	"	"	——	"	—— 190—.
Fifth	"	——	"	"	——	"	—— 190—.
Sixth	"	——	"	"	——	"	—— 190—.

ASSIGNMENT.

For value received I hereby transfer and assign to ——— this temporary certificate, and hereby appoint and constitute ——— ——— my true and lawful attorney to transfer said certificate, with full power of substitution in the premises.
Dated at ———, this ——— day of ———, 190—.
Witness: ——— ———. ——— ———.

The persons organizing an association must enter into articles of association, as required by section 5133. (The sections referred to herein are of the United States Revised Statutes.) The following is submitted as a general form for these articles:

ARTICLES OF ASSOCIATION.

(Executed in Duplicate.)

For the purpose of organizing an association to carry on the business of banking, under the laws of the United States, the undersigned subscribers for the stock of the association hereinafter named do enter into the following articles of association:

First. The title of this association shall be "The ——— ———."

Second. The place where its banking house or office shall be located, and its operations of discount and deposit carried on, and its general business conducted, shall be ———.

Third. The board of directors shall consist of ——— shareholders. The first meeting of the shareholders for the election of directors shall be held at ——— on the ———, or at such other place and time as a majority of the undersigned shareholders may direct.

Fourth. The regular annual meeting of the shareholders for the election of directors shall be held at the banking house of this association on the second Tuesday of January of each year; but if no election shall be held on that day, it may be held on any other day, according to the provisions of section 5149 of the Revised Statutes of the United States, and all elections shall be held according to such regulations as may be prescribed by the board of directors, not inconsistent with the provisions of the national-banking law, and of these articles.

Fifth. The capital of this association shall be ——— thousand dollars, divided into shares of $100 each; but the capital may, with the approval of the Comptroller of the Currency, be increased at any time by shareholders owning two-thirds of the stock, according to the provisions of an act of Congress approved May 1, 1886; and in case of the increase of the capital of the association, each shareholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors, a majority of whom shall be a quorum to do business, shall elect one of its members president of this association, who shall hold his office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director. The directors shall have power to elect a vice-president, who shall also be a member of the board of directors, and who shall be authorized, in the absence or inability of the president from any cause, to perform all acts and duties pertaining to the office of president, except such as the president only is authorized by law to perform, and to elect or appoint a cashier, and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue them in office, or to dismiss them

as, in the opinion of a majority of the board, the interests of the association may demand.

The directors shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to make all by-laws that it may be proper for them to make, not inconsistent with law, for the general regulation of the business of the association and the management of its affairs, and generally to do and perform all acts that it may be legal for a board of directors to do and perform under the Revised Statutes aforesaid.

Seventh. This association shall continue for the period of twenty years from the date of the execution of its organization certificate, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These articles of association may be changed or amended at any time by shareholders owning a majority of the stock of the association, in any manner not inconsistent with law; and the board of directors, or any three shareholders, may call a meeting of the shareholders for this or any other purpose, not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city, or county where the bank is located, or by mailing to each shareholder notice in writing thirty days before the time fixed for the meeting.

In witness whereof we have hereunto set our hands this ——— day of ———.

———	———	———	———.
———	———	———	———.
———	———	———	———.
———	———	———	———.
———	———	———	———.

NOTE.— Five persons are required to sign; more may sign, but this number is sufficient.

Instead of providing, in the third article, for the election of the first board of directors, the names of the directors may be given in the article. When the stockholders are agreed as to the persons who are to constitute the directors, this is more convenient that to hold an election. In this event the third article should read as follows:

The board of directors shall consist of ——— shareholders, and the following persons [here insert their names] are hereby appointed directors of this association, to hold their offices as such until the regular annual election takes place, pursuant to the fourth article of these articles of association, and until their successors are chosen and have qualified.

The third article, if desired, may also be made to provide for what is termed a sliding scale instead of a fixed number or directors; in other words, a minimum and maximum number of directors, in which event the article should read as follows:

The board of directors shall consist of not less than [insert minimum number] nor more than [insert maximum number] shareholders. The number of directors elected at each annual meeting shall constitute the board for the year, all vacancies to be filled in accordance with the provisions of section 5148.

The persons uniting to organize a national bank must be natural persons — that is, individuals who can legally hold and control property in their individual right — and not corporations, firms, or associations of any character.

The proportion of capital required for organization (that is, one-half) must be paid in money, and each subsequent installment must be so paid until all the capital is paid in. Promissory notes or other evidences of debt can not be taken in payment for subscriptions to capital stock.

Five persons at least are required to sign the articles of association, and those who sign the articles must also sign the organization certificate. The certificate should be executed at the same time or subsequent to execution of the articles of association.

The articles of association, organization certificate, and certificate of payment of capital must be executed in duplicate, and one copy of each filed in the office of the Comptroller of the Currency and the other retained by the bank.

ORGANIZATION CERTIFICATE.

We, the undersigned, whose names are specified in article fourth of this certificate, having associated ourselves for the purpose of organizing an association for carrying on the business of banking, under the laws of the United States, do make and execute the following organization certificate:

First. The title of the association sall be "The ——— ———."

Second. The said association shall be located in the ——— of ———, county of ———, and State of ———, where its operations of dicount and deposits are to be carried on.

Third. The capital stock of this association shall be ——— dollars ($———), and the same shall be divided into ——— shares of one hundred dollars each.

Fourth. The name and the residence of each shareholder of this association, with the number of shares held, are as follows:

Name.	Residence.	No. of Shares.

NOTE.— The names, etc., of all the shareholders must be given.

Fifth. This certificate is made in order that we may avail ourselves of the advantages of the aforesaid laws of the United States.

In witness whereof we have hereunto set our hands this ——— day of ———.

——— ——— ——— ———.
——— ——— ——— ———.
——— ——— ——— ———.
——— ——— ——— ———.
——— ——— ——— ———.

NOTE.—Those that have signed the articles of association are required to sign this certificate, and they must do so in their own handwriting. They must also make acknowledgment.

STATE OF ——,
County of ——, *ss:*

Before the undersigned, a —— of ——, personally appeared ——, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office this —— day of ——.

—— ——.

[OFFICIAL SEAL OF OFFICER.]

The association will have succession for a period of twenty years from the date of execution of the organization certificate, and not from the date of the certificate of the Comptroller of the Currency authorizing the bank to commence business. (See Sec. 5136.)

The name, etc., of each stock subscriber, but not necessarily his signature, is required in the fourth subdivision. Each person who signs the articles of the association is also required to sign the organization certificate.

The organization certificate must be acknowledged before a judge of a court of record or a notary public having a seal, and all the shareholders who sign in the fifth subdivision must make proper acknowledgment of the execution of the certificate.

Inasmuch as the laws of the several States differ as to the rights of married women in regard to their separate estates and property, and as to the effects of covenants and agreements made by them, and also as to the forms of acknowledgment of instruments executed by them, any organization papers bearing the signatures of women must be accompanied by evidence that under the laws of the State they have the power to be parties to the organization.

When the organization of a bank is effected and stock certificates are paid for in full and issued, they must be in the names of shareholders and for the numbers of shares of stock listed in the organization certificate, transfers to be made in the regular manner in the case of any stock which changes ownership.

The foregoing instructions apply solely to new organizations. If it be desired to convert, under the provisions of

section 5154, a bank existing under State laws, the method of procedure and the forms necessary will be found elsewhere.

DIRECTORS.

After the execution of the organization certificate, if the directors are not designated in the articles of association, the shareholders should proceed to elect directors as provided in section 5145. Each director must, after his election or appointment (but not prior to the date of execution of the articles and organization certificate), take an oath of the following form:

OATH OF DIRECTOR.

STATE OF —,
County of ———, *ss*:

I, the undersigned, director of The ———, of ———, in the State of ———, being a citizen of the United States, and resident of the State of ———, do solemnly swear that I will, so far as the duty devolves on me, diligently and honestly administer the affairs of said association; that I will not knowingly violate, or willingly permit to be violated, any of the provisions of the statutes of the United States under which this association has been organized; and that I am the owner, in good faith, and in my own right, of the number of shares of stock required by said statutes, subscribed by me or standing in my name on the books of the said association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

——— ———.
Place of residence, ———.

Subscribed and sworn to this ——— day of ———, before the undersigned, a ——— in and for said county.

[OFFICIAL SEAL OF OFFICER.] ——— ———,
Notary Public.

NOTE.— Each director when elected must take the oath of office, and, under section 5147, U. S. R. S., it should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, county, or court official to the effect that such officer is authorized to take acknowledgments must be attached.

OATH OF DIRECTORS.

STATE OF ———,
County of ———, *ss*:

We, the undersigned, directors of "The ———," of ———, in the State of ———, being citizens of the United States and residents of the State of ———, do, each for himself, and not one for the other, solemnly swear that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said association; and that we will not knowingly violate, or willingly permit to be violated, any of the provisions of the statutes of the United States under which said association has been organized; and each for himself does solemnly swear that he is the owner in good faith, and in his own right, of the number of shares of

stock required by said statutes, subscribed by him or standing in his name on the books of the said association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

Name. (Original signatures necessary.)	Place of Residence.

Subscribed and sworn to this ——— day of ———, before the undersigned, a ——————— in and for said County.

[OFFICIAL SEAL OF OFFICER.]

——— ———,
Notary Public.

Every director must own in his own right at least 10 shares of the capital stock of the association of which he is a director, unless the capital of the bank shall not exceed $25,000, in which case he must own in his own right at least 5 shares of such capital stock. Any director who ceases to be the owner of the required number of shares of the stock or who becomes in any other manner disqualified, shall thereby vacate his place. (Sec. 5146, Rev. Stat., as amended February 28, 1905.)

At least three-fourths of the directors must have resided in the State, Territory, or district in which the association is located for a year or more immediately preceding their election, and must be residents therein during their continuance in office.

In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Under section 5144 shareholders may vote by proxies duly authorized in writing, but no officer, clerk, teller, or bookkeeper of the association can act as proxy, and no shareholder whose liability is past due and unpaid shall be allowed to vote. The Comptroller, supported by certain decisions of the courts, holds that a director is an officer within the meaning of said section, and, furthermore, that the prohibition with regard to the voting of stock by a shareholder who is liable to the bank merely applies to subscriptions to capital stock.

Cumulative voting at meetings of national banking associations is not permissible. For instance, if a shareholder is

the owner of 10 shares of stock and 7 directors are to be elected, he can not cast 70 votes in favor of any one person as a director, but is at liberty only to cast 10 votes for each of the 7 candidates.

FORM OF PROXY.

Know all men by these presents that I, ——— ———, do hereby constitute and appoint ——— ——— attorney and agent for me, and in my name, place, and stead to vote as my proxy at any and all elections of directors of ——— ——— according to the number of votes I should be entitled to vote if there personally present.

In witness whereof I have hereunto set my hand this ——— day of ———, one thousand nine hundred and ———.

——— ———.

Signed in presence of —

——— ———.

——— ———.

The directors having been elected and having qualified should, as soon as practicable, elect a president and vice-president of the association, a cashier, and such other officers as may be required (section 5136, paragraph 5), and call in the subscriptions to the stock according to the terms of subscription and the requirements of the law. As soon as at least 50 per cent of the capital stock of the association is paid in and all other legal requirements complied with, a certificate in substantially the following form should be executed and sworn to by the president or cashier and a majority of the directors, and forwarded to the Comptroller.

CERTIFICATE OF OFFICERS AND DIRECTORS RELATIVE TO PAYMENT OF CAPITAL STOCK AND COMPLIANCE WITH OTHER LEGAL REQUIREMENTS.

The undersigned, officers and directors of ——— ———, located at ———, organized under the provisions of the Revised Statutes of the United States authorizing the organization of national banking associations, do hereby certify that of the authorized capital stock of $——— there has been paid into said bank, in cash, as permanent capital $———, constituting the first installment, and that no part of this sum is represented by promissory notes or other evidences of debt; also that the name and place of residence of each director, and the amount of stock individually owned in good faith, are as follows:

Name of directors.[a]	Place of residence. (Town or city and State.)	Number of shares of stock.

[a] The names, etc., of *all* the directors of the association must appear on this page, but only a majority of the directors and the president or cashier are required to sign on the following page and make acknowledgement.

It is further certified that the association has in good faith complied with all of the provisions that are required to be complied with before receiving authority to commence the business of banking.

—— ——,
—— ——,
—— ——,
—— ——, *Directors.*
—— ——,
—— ——,
—— ——,

—— ——, *President.*
—— ——, *Cashier.*

STATE OF ——,
County of ——, *ss:*

Before the undersigned, a —— of ——, personally appeared the above-named directors and other officers of the aforesaid national bank, and made oath that the foregoing certificate and the matters and things therein set forth are true, to the best of their knowledge and belief.

Witness my hand and seal of office this —— day of —— 190—.

[OFFICIAL SEAL OF OFFICER.]

For instructions as to payment and certification of subsequent installments, see page 687.

DEPOSIT OF BONDS.

Banks with capital of $150,000 or less are required to deposit bonds equal to one-fourth of their capital, and a deposit of at least $50,000 in bonds must be made by banks with capital in excess of $150,000. The issue of circulating notes is optional with the directors of a bank, but deposit of bonds is mandatory.

United States registered interest-bearing bonds should be sent to the Comptroller of the Currency for transfer to and deposit with the Treasurer of the United States in trust for the association to the account of which they are to be credited. In assigning bonds care should be exercised to enter the exact corporate title of the association.

Coupon bonds can be exchanged for registered bonds by sending them to the Comptroller of the Currency with a request for their exchange and that the registered bonds be issued to and deposited with the Treasurer of the United States in trust for the association interested.

The Comptroller will authorize the payment of interest on bonds to the bank depositing them, and the Treasurer of the United States will pay the interest, by check, to the order of the bank, payable at the office of any United States Assistant Treasurer or at any United States depository.

WITHDRAWAL OF BONDS.

The law permits national banking associations to withdraw bonds in excess of the legal requirement, held by the Treasurer of the United States in trust, upon deposit of a like amount of lawful money with the Treasurer or an Assistant Treasurer of the United States, to provide for the redemption of the currency secured by such bonds.

Authority to withdraw the bonds must be conferred upon the Comptroller of the Currency by the board of directors, and upon some one other than a Government official to sell and assign them. If an official of the bank is authorized to dispose of the bonds the resolution should be certified by some officer of the association other than the one empowered to assign them. It is recommended that resolutions be adopted only at regular meetings, but when passed at a special meeting the certificate must be signed by two officers, a form for which purpose will be furnished upon application to the Comptroller of the Currency.

CIRCULATING NOTES.

National banking associations are entitled to receive and issue circulating notes equal to the par value of the bonds deposited, not exceeding the amount of the paid-in capital stock, but only one-third of the amount issued to an association can consist of $5 notes. (See section 5171 as amended March 14, 1900.)

Section 13 of the act of March 14, 1900, imposes a semi-annual tax, of one-fourth of 1 per cent on the average amount of notes in circulation, secured by 2 per cent bonds issued under the provisions of that act. Circuating notes secured by all other classes of bonds are subject to the semiannual duty of one-half of 1 per cent provided by section 5214 of the Revised Statutes.

ORIGINAL ORDER FOR PLATES AND CIRCULATION.

[Letter —; series of 1902.]

Charter No. ——.

—— NATIONAL —— BANK OF ——,

—— ——.

To the COMPTROLLER OF THE CURRENCY.

SIR: You are requested to have plates engraved for this bank, the cost to be paid upon demand, and circulating notes printed therefrom as follows:

Cost of plates.	No. of sheets ordered.	Denominations on sheets.	Value per sheet.	Amount of circulation.
$75		$5, $5, $5, $5	$20	$
75		$10, $10, $10, $20	50	
50		$50, $100	150	
		Total		

Respectfully,

—— ——, *Cashier.*

NOTE.—Original orders for circulation should be as nearly one and one-fourth in amount of the par value of bonds to be deposited as can be made from multiples of the face value of sheets of notes ordered. Circulation ordered in excess of the bonds deposited will be required to replace mutilated notes returned for redemption and destruction.

The act of March 14, 1900, provides that no national bank shall be entitled to receive from the Comptroller, or to issue, more than one-third in amount of its circulating notes of the denomination of $5. Banks desiring circulating notes of the denomination of $5, must necessarily order, at least, two plates.

It requires about forty days to engrave the plate and to print circulating notes, but the order can not be acted upon until all legal requirements are satisfied, including the deposit of bonds with the Treasurer of the United States, as the charter number of the association, which can not be previously determined, must appear upon the plate from which the notes are printed.

SUPPLEMENTARY ORDER.

Charter No. ——.

—— ——,

—— ——.

To the COMPTROLLER OF THE CURRENCY.

SIR: You are requested to have printed for this bank circulating notes in blank to the amount of (see footnote) —— dollars, and of the following denominations:

Number of sheets.	Plates.	Amount.
	Sheets, $5, $5, $5, $5. ($20 per sheet)	$
	Sheets, $10, $10, $10, $20 ($50 per sheet)	
	Sheets, $50, $100 ($150 per sheet)	
	Total	

Respectfully,

—— ——, *Cashier.*

NOTE.—Bank officers should observe the multiples of the different sheets of notes and enter amounts that can be made from such multiples. This

will save returning orders for correction. Under the act of March 14, 1900. five-dollar notes are limited to one-third of a bank's circulation. In ordering currency bank officers should observe this limit, taking into consiedration, in estimating the amount needed, both the amount of fives outstanding and the amount already printed and on hand in the Treasury Department.

CERTIFICATE OF AUTHORITY TO COMMENCE BUSINESS.

The necessary amount of bonds having been deposited with the Treasurer, the Comptroller will, if he is satisfied that the association has complied with the requirements of the law, and that the shareholders have, in good faith, organized for the legitimate objects contemplated by the bank act, give to the association a certificate authorizing it to commence the business of banking (secs. 5168, 5169). This certificate, upon its receipt, must be published according to the requirements of section 5170, and proof of publication forwarded to the Comptroller at the proper time.

This and other certificates referred to elsewhere may be published for the period of time required by law, either in a weekly newspaper, a weekly edition of a daily newspaper, or in every issue of a daily having no weekly edition.

The certificate of authority to begin business or, as is generally understood, the charter issued to a national banking association, reads as follows:

No. ———.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Washington, ——— ———, 190—.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that —

The ——— ———, located in the ——— of ———, in the county of ——— and State of ———, has complied with all the provisions of the statutes of the United States required to be complied with before an association shall be authorized to commence the business of banking:

Now, therefore, I, ——— ———, Comptroller of the Currency, do hereby certify that —

The ——— ———, located in the ——— of ———, in the county of ——— and State of ———, is authorized to commence the business of banking as provided in section fifty-one hundred and sixty-nine of the Revised Statutes of the United States.

In testimony whereof witness my hand and seal of office this ——— day of ———, 190—.

[SEAL.]

——— ———,
Comptroller of the Currency.

COMMENCEMENT OF BUSINESS.

The association having received authority to commence the business of banking, it is presumed that a suitable banking house or room has been secured, and also a vault or safe, which should be burglar and fire proof. In ordering stationery provision should be made for the printing of the charter number of the bank on letter heads. The Comptroller should be promptly advised of the date on which the bank begins business. Notification blank for the purpose is furnished.

PAYMENT OF CAPITAL.

The certificate of officers and directors, a form for which is given elsewhere, is the certificate of the payment in cash of the first installment of the capital. The five remaining installments must also be paid in money and certified by the president or cashier, under seal of the bank, to the Comptroller monthly from the date of the issuance of his certificate of authority to commence business (section 5140).

The form for the latter certificates is as follows:

CERTIFICATE OF PAYMENT OF CAPITAL STOCK.

——— ———.

To the COMPTROLLER OF THE CURRENCY,
Washington, D. C.

SIR: It is hereby certified that the ——— installment of ——— ——— dollars ($———), has been paid in on account of the capital stock of The ——— ———, the certification of payments to date being as follows:

First installment (at organization), $———.
Second installment, $———.
Third installment, $———.
Fourth installment, $———.
Fifth installment, $———.
Sixth installment, $———.
Total, $———.

——— ———,
President or Cashier.

STATE OF ———,
County of ———, ss:

Subscribed and sworn to before me this ——— day of ———.

[OFFICIAL SEAL OF OFFICER.]

——— ———, *Notary Public.*

NOTE.— The second and subsequent payments need not be restricted to 10 per cent each, as the capital stock of the bank may be paid, if desired, in advance of the time required by law. Do not include in certificates a fraction of a dollar.

No payments on account of subscriptions to the capital stock should be carried to stock account, nor entered in reports of condition as capital

stock, until date of certification to this office. Pending such certification payments should be carried in a separate account to the credit of shareholders and entered in reports to this office as "capital paid in, not certified."

For the legal method of enforcing the payment of subscriptions to capital stock, see section 5141.

INCREASE OF CAPITAL STOCK.

A national banking association may, with the consent of the Comptroller of the Currency and by a vote of shareholders owning two-thirds of the shares, increase its capital stock to any sum approved by the Comptroller. No increase is valid until the whole amount is paid in cash and the Comptroller's certificate of approval is issued, prior to which, if required, additional bonds must be deposited. (Section 5142, also act of Congress approved May 1, 1866.)

A portion of a proposed increase will not be approved by the Comptroller. The whole amount, as stated in the resolution adopted by the vote of the shareholders, must be paid in and the payment certified to the Comptroller. The increase becomes operative upon the issuance of the Comptroller's certificate of approval.

An association that contemplates increasing its capital stock should advise the Comptroller thereof before formally submitting the question to the shareholders, and, if the proposition is approved, he will furnish necessary blanks and instructions in relation to the course of procedure. (See notice for shoreholders' meeting.)

In increasing the capital stock of a bank no moneys in the surplus fund or in the undivided profit account can be used except by the declaration of a dividend by the board of directors in the regular course, whereupon the shareholders, if they so desire, may use the proceeds thereof in payment to that extent of their subscription to the additional stock. Such portion only of the surplus fund as exceeds the amount required by law to be accumulated can be capitalized in the manner indicated.

RESOLUTION TO INCREASE CAPITAL STOCK.

No. ——.

THE ——— NATIONAL ——— BANK OF ———,
(Date.) ——— ———.

At a meeting of the shareholders of The ——— National ——— Bank of ———, held on ———, thirty days' notice of the proposed business

having been given, at which shareholders were present in person and by proxy, representing ——— shares of the stock of this association, it was

Resolved, That, under the provisions of the act of May 1, 1886, the capital stock of this association be increased in the sum of $———, making the total capital $———.

The above resolution was adopted by the following vote, representing more than two-thirds of the capital stock of the association:

Name of shareholder.	Residence.	Name of proxy.	No. of shares.
Total number of shares voted in favor of the resolution			
Total number of shares voted against the resolution			
Total number of shares represented at the meeting			
Total number of shares of capital stock			

I hereby certify that the above is a true and correct report of the vote and of the resolution adopted at a meeting of the shareholders of this bank held on ———.

[SEAL OF BANK.] ——— ———,

President or Cashier.

Subscribed and sworn to before me this ——— day of ———, A. D. ——.

[OFFICIAL SEAL OF OFFICER.]

——— ———,

Notary Public.

CERTIFICATE OF INCREASE OF CAPITAL STOCK.

No. ——.

——— NATIONAL ——— BANK OF ———,

———, ——, ——.

To the COMPTROLLER OF THE CURRENCY,

Washington, D. C.:

It is hereby certified that the capital stock of "The ——— National ——— Bank of ———" has been increased, pursuant to the provisions of the act of Congress approved May 1, 1886, in the sum of ——— dollars, all of which has been paid in cash, and that the paid-up capital stock of said bank now amounts to ——— dollars.

[SEAL OF BANK.] ——— ———,

President or Cashier.

STATE OF ———,

County of ———, ss:

Subscribed and sworn to before me this ——— day of ———, A. D. ——.

[OFFICIAL SEAL OF OFFICER.] ——— ———,

9811—05——2 *Notary Public.*

REDUCTION OF CAPITAL STOCK.

A national banking association may, with the consent of the Comptroller of the Currency and by a vote of shareholders

owning two-thirds of the shares, reduce its capital stock to any sum not below the minimum amount required by the National Bank Act. The reduction becomes operative upon the issuance of the Comptroller's certificate of approval, prior to which the circulation of the bank must be reduced (if excessive) to at least the amount of the capital after reduction by a deposit of lawful money with the Treasurer of the United States and the withdrawal of a like amount of bonds.

An association that contemplates reducing its capital stock should advise the Comptroller thereof before formally submitting the question to the shareholders, and, if the proposition is approved, he will furnish necessary blanks and instructions in relation to the course of procedure. See notice for shareholders' meeting.

RESOLUTION TO REDUCE CAPITAL STOCK.

No. ——.

THE —— NATIONAL —— BANK OF ——,

(Date.) —— ——.

At a meeting of the shareholders of The —— National —— Bank of ——, held on ——, thirty days' notice of the proposed business having been given, at which shareholders were present in person and by proxy, representing —— shares of stock of this association, it was

Resolved, That, under the provisions of section 5143, United States Revised Statutes, and of the law amendatory thereof, the capital stock of this association be reduced in the sum of $——, leaving the total capacity after said reduction $——.

The foregoing resolution was adopted by the following vote, representing more than two-thirds of the capital stock of the association:

Name of shareholder.	Residence.	Name of Proxy.	No. of Shares.
Total number of shares voted in favor of the resolution..............			
Total number of shares voted against the resolution.................			
Total number of shares represented at the meeting..................			
Total number of shares of capital stock................................			

I hereby certify that the foregoing is a true and correct report of the vote and of the resolution adopted at a meeting of the shareholders of this bank, held on —— ——.

[SEAL OF BANK.] —— ——,

President or Cashier.

Subscribed and sworn to before me this —— day of ——, A. D. ——.

[OFFICIAL SEAL OF OFFICER.] —— ——,

Notary Public.

No part of the reduction can be carried to surplus or to undivided profits without the unanimous consent of the shareholders. When the reduction is made the shareholders should return their old certificates. New certificates for the capital as reduced should then be issued. It is not unlawful to issue certificates for fractional shares and to pay dividends thereon.

BY-LAWS.

When a bank is organized the board of directors should adopt by-laws. (Section 5136, paragraph 6.) The following is submitted as a general form that may be modified in any manner deemed expedient, but not in conflict with law or the articles of association:

GENERAL FORM OF BY-LAWS OF NATIONAL BANKS.

BY-LAWS OF THE [HERE INSERT THE TITLE OF THE BANK], ORGANIZED UNDER THE NATIONAL-BANKING LAWS OF THE UNITED STATES.

ELECTIONS.

SECTION 1. The regular annual meetings of the shareholders of this bank for the election of directors shall be held at its banking house on the second Tuesday of January of each year, between the hours of 10 and 4 of said day. It shall be the duty of the board of directors, within one month prior to the time of said election, to appoint three shareholders to be judges of said election, who shall hold and conduct the same, and who shall, after the election has been held, notify under their hands the cashier of this bank of the result thereof and the names of the directors-elect.

SEC. 2. The cashier, upon receiving the returns of the judges of the elections as aforesaid, shall cause the same to be recorded upon the minute book of the bank, and shall notify the directors-elect of their election, and of the time at which they are required to meet at the banking house of the bank for the purpose of organizing the new board. If at the time fixed for the meeting of the directors-elect there is not a quorum in attendance, the members present may adjourn from time to time until a quorum is secured; and no business shall be transacted prior to taking the oath of office as prescribed by law.

SEC. 3. If, for any cause, the annual election of directors is not held on the date fixed in the articles of association, the directors in office shall order an election to be held on some other day, of which special election notice shall be given in accordance with the requirements of section 5149, United States Revised Statutes, judges appointed, returns made and recorded, and the directors-elect notified, according to the provisions of sections 1 and 2 of these by-laws.

OFFICERS.

SEC. 4. The officers of this bank shall be a president, vice-president (who shall be members of the board of directors), cashier, and such other officers as may be from time to time required for the prompt and orderly transaction of its business, to be elected or appointed by the board of directors, by whom their several duties shall be prescribed.

SEC. 5. The president shall hold his office for the current year for which the board of which he shall be a member was elected, unless he shall resign, become disqualified, or be removed; and any vacancy occurring in the office of president or in the board of directors shall be filled by the remaining members.

SEC. 6. The cashier and the subordinate officers and clerks shall be appointed to hold their offices, respectively, during the pleasure of the board of directors.

SEC. 7. The cashier of this bank shall be responsible for all the moneys, fund, and valuables of the bank, and shall give bond, with security to be approved by the board, in the penal sum of ——— dollars, conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all such moneys, funds, and valuables, and deliver the same to the order of the board of directors of this bank, or to the person or persons authorized to receive them.

SEC. 8. The president of this bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the board of directors or by the cashier, or otherwise come into his hands as president, and shall give bond, with security to be approved by the board, in the penal sum of ——— dollars, conditioned for the faithful discharge of his duties as such president, and that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such president and pay over and deliver the same to the order of the board of directors, or to any other person or persons authorized by the board to receive the same.

SEC. 9. The teller shall be responsible for all such sums of money, propeerty, and funds of every description as may from time to time be placed in his hands by the cashier, or otherwise come into his possession as teller; and shall give bond, with security to be approved by the board, in the penalty of ——— dollars, conditioned for the honest and faithful discharge of his duties as teller, and that he will faithfully apply, account for, and pay over all moneys, property, and funds of every description that may come into his hands, by virtue of his office as teller, to the order of the board of directors as aforesaid, or to such person or persons as may be authorized to demand and receive the same.

SEAL.

SEC. 10. The following is an impression of the seal adopted by the board of directors of this bank:

(Impression of seal.)

CONVEYANCE OF REAL ESTATE.

SEC. 11. All transfers and conveyances of real estate shall be made by the association, under seal, in accordance with the orders of the board of directors, and shall be signed by the president or cashier.

INCREASE OF STOCK.

SEC. 12. Whenever an increase of stock shall be determined upon, in accordance with law, it shall be the duty of the board to notify all the shareholders of the same, and to cause a subscription to be opened for such increase of capital. In the increase of capital each shareholder shall have the privilege of subscribing for such number of shares of the new stock as he may be entitled to subscribe for, according to his existing stock in the bank. If any shareholder fails to subscribe for the amount of stock to which he may be entitled, the board of directors may determine what disposition shall be made of the privilege of subscribing for the unsubscribed stock.

BUSINESS OF THE BANK.

SEC. 13. This bank shall be opened for business from —— o'clock a. m. to —— o'clock p. m. of each day of the year excepting Sundays, and days recognized by the laws of this State as holidays. When any regular meeting of the board of directors falls upon a holiday, the meeting shall be held on such other day as the board may previously designate.

SEC. 14. The regular meetings of the board of directors shall be held on the [here insert time of meeting]. Special meetings may be called by the president, cashier, or at the request of three or more directors, and should there be no quorum at any regular or special meeting, the members present may adjourn from day to day until a quorum is in attendance. In the absence of a quorum no business shall be transacted.

SEC. 15. There shall be a committee, to be known as the discount committee, consisting of the president, cashier, and directors, appointed by the board every ——— months, to continue to act until succeeded, who shall have power to discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange; and who shall, at each regular meeting of the board of directors, make a report of all bills, notes, and other evidences of debt discounted and purchased by them for the bank since their last report.

MINUTE BOOK.

SEC. 16. The organization papers of this bank, the returns of the judges of the elections, the proceedings of all regular and special meetings of the directors and of the shareholders, the by-laws and any amendments thereto, and reports of the committees of directors shall be recorded in the minute book; and the minutes of each meeting shall be signed by the president and attested by the cashier.

TRANSFERS OF STOCK.

SEC. 17. The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the restrictions and provisions of the national banking laws; and a transfer book shall be provided in which all assignments and transfers of stock shall be made.

SEC. 18. Transfers of stock shall not be suspended preparatory to the declaration of dividends; and, unless an agreement to the contrary shall be expressed in the assignments, dividends shall be paid to the shareholders in whose name the stock shall stand at the date of the declaration of dividends.

SEC. 19. Certificates of stock, signed by the president and cashier, may be issued to shareholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank, canceled, preserved, and new certificates issued.

EXPENSES.

SEC. 20. All the current expenses of the bank shall be paid by the cashier, who shall every six months, or oftener if required, make to the board a detailed statement thereof.

CONTRACTS.

SEC. 21. All contracts, checks, drafts, etc., and all receipts for circulating notes received from the Comptroller of the Currency, shall be signed by the president or cashier.

EXAMINATIONS.

SEC. 22. There shall be appointed by the board of directors a committee of ——— members, whose duty it shall be to exercise a supervision of the business of the bank, and to examine every three months the affairs of this bank, count its cash, compare its assets and liabilities with the accounts

of the general ledger, ascertain whether the accounts are correctly kept and the condition of the bank corresponds therewith, and whether the bank is in a sound and solvent condition, and to recommend to the board such changes in the manner of doing business, etc., as shall seem to be desirable, the result of which examination shall be reported in writing to the board at the next regular meeting thereafter.

SEC. 23. The board of directors shall have power to change the form of the books and accounts when deemed expedient, and define the manner in which the affairs of the bank shall be conducted.

QUORUMS.

SEC. 24. A majority of all the directors is required to constitute a quorum to do business.

SEC. 25. These by-laws may be changed or amended by the vote of a majority of the directors.

CONVERSION OF STATE BANK.

Section 5154 provides for the conversion of banks existing under State laws into national banking associations, and reads as follows:

Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association.

In case of the conversion of a State bank, there is not a dissolution of the State corporation, but merely a change of title and governmental supervision; the bank is liable for all obligations and may enforce all contracts made with it while a State corporation.

If preferred, the State banks may be placed in voluntary liquidation in conformity with State law, and those interested therein organize a national bank, which association will be at liberty to buy the properly purchaseable assets of the former, and there need be no interruption in business. A specific contract is necessary for the purchase of assets and assumption of liabilities to depositors and other creditors of the State bank. In such cases bills receivable and other assets should be listed, carefully scrutinized, and properly indorsed, the banking house, if purchased, deeded to the new bank, and the deed recorded; all general and individual accounts closed and transferred, and new accounts opened and old pass books called in and new books issued. The capital must be fully paid in cash, and not in assets of the closed bank.

Under the national banking law, associations can loan on personal security only; are prohibited from investing in real estate other than that necessary to the conduct of the business of the bank; and are restricted in the volume of accommodations to any one person, company, corporation, or firm, etc., to 10 per cent of the capital stock of the national bank actually paid in. The courts have held that it is ultra vires of a national banking association to invest in the stock of another corporation. State banks proposed to be converted and holding such prohibited assets are required to dispose of them prior to receiving official approval to begin business as a national banking association, and an agreement is exacted from directors of a national banking association organized to succeed a State or private bank that no assets of that character will be purchased by the association.

The following is the form of notice to be submitted of intention to convert a State bank into a national banking association:

APPLICATION TO CONVERT A STATE BANK.

The name of the place should form a part of the title, thus "The First National Bank of A———," but the name of the State should not be included.

Consideration will not be given to an application for a title including the word "First" if a national bank exists or has existed at the given locality; nor to an application for a title identical with that of a national bank heretofore in existence, nor to one materially similar to that of a national, State, or other bank existing in the place.

——— ———, 190—.

TO THE COMPTROLLER OF THE CURRENCY,

Washington.

SIR: Notice is hereby given that we, the undersigned, being a majority of the board of directors of "The ——— ———," having a paid in and unimpaired capital of $———,[a] intend to convert the said bank into a national banking association, in accordance with the provisions of section 5154 of the Revised Statutes of the United States, under the title "The ——— ———," to be located at ——— ———, county of ———, State of ———, with a capital of $———.

We request that the title be reserved for a period of sixty days and the necessary conversion papers and instructions sent to ——— ———, at ——— ———.

Signature of directors.	Residences.

[a] If the capital is less than the amount required of a national bank of primary organization, the necessary increase must be effected, in conformity with the banking laws of the State, prior to the execution of conversion papers. Evidence, from the proper State official, of the legal increase is required with the conversion papers.

When the application to convert has received the Comptroller's approval the shareholders should execute a form similar to the following:

AUTHORITY FOR CONVERSION OF STATE BANK.

We, the undersigned stockholders of The ———, located in the ———. county of ———, State of ———, having a capital of ——— dollars, do hereby authorize and empower the directors thereof to change and convert said bank into a national banking association under the provisions of section 5154 of the Revised Statutes of the United States, or of acts amendatory thereof; and we do also authorize the directors, or a majority thereof, to make and execute the articles of association and organization certificates required to be made or contemplated by said statutes; and also to make and execute all other papers and certificates, and to do all acts necessary to convert the said bank into a national banking association, and to do and perform all such acts as may be necessary to transfer the assets of every description and character of the said State bank to the national banking association into which it is to be converted, so that the said conversion may be absolute and complete; and we do hereby assume, and authorize the said directors to assume, as the name of the national banking association into which the said State bank is to be converted, "The ———;" and we do hereby appoint, ———, ———, ———, ———, who are now the directors of the said State bank, to be the directors of the said national bank, to hold their offices as such directors until the regular annual election of directors is held, pursuant to the provisions of said Revised Statutes, and until their successors are chosen and qualified; and we do hereby authorize the said directors of the said national bank to continue in office the officers of the said bank, or to appoint or elect others.

In witness whereof we have hereunto set our hands and written against our names the number of shares owned by us, respectively, this ——— day of ———, A. D. ———.

Signature of stockholders. [a]	Number of shares owned by each.

ARTICLES OF ASSOCIATION.

(Executed in duplicate.)

We, the undersigned, directors of The ——— ———, having been authorized by the owners of two-thirds of the capital stock of said bank to change and convert the said bank into a national banking association under the provisions of section 5154 of the Revised Statutes of the United States, or of acts amendatory thereof, and to execute articles of associa-

[a] The signatures of the owners of at least two-thirds of the stock.

tion, do hereby, in our own behalf, and in behalf of the stockholders whom we represent, make and execute the following articles of association:

First. The title of the association into which the said State bank is to be changed and converted shall be "The ——— ———."

Second. The place where its banking house or office shall be located, and its operations of discount and deposit carried on, and its general business conducted shall be the ———, county ———, State of ———.

Third. The board of directors shall consist of ——— shareholders.

Fourth. The regular annual meeting of the shareholders for the election of directors shall be held at the banking house of this association on the second Tuesday of January of each year; but if no election shall be held on that day, it may be held on any other day, according to the provisions of section 5149 of the Revised Statutes of the United States, and all elections shall be held according to such regulations as may be prescribed by the board of directors, not inconsistent with the provisions of the national-banking law, and of these articles.

Fifth. The capital stock of this association shall be ——— thousand dollars, divided into shares of one hundred dollars each; but the capital may, with the approval of the Comptroller of the Currency, be increased at any time by shareholders owning two-thirds of the stock, according to the provisions of an act of Congress approved May 1, 1886; and in case of the increase of the capital of the association, each shareholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to, according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors, a majority of whom shall be a quorum to do business, shall elect one of its members president of this association, who shall hold his office (unless he shall be disqualified, or be sooner removed by a two-thirds vote of all of the members of the board) for the term for which he was elected a director. The directors shall have power to elect a vice-president, who shall also be a member of the board of directors, and who shall be authorized, in the absence or inability of the president from any cause, to perfom all acts and duties pertaining to the office of president, except such as the president only is authorized by law to perform, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them and continue them in office, or to dismiss them, as, in the opinion of a majority of the board, the interests of the association may demand.

The directors shall have power to define the duties of the officers and clerks of the association; to require bonds from them and to fix the penalty thereof; to regulate the manner in which the elections of directors shall be held, and to appoint judges of the elections; to make all by-laws that it may be proper for them to make not inconsistent with law, for the general regulation of the business of the association and the management of its affairs, and generally to do and perform all acts that it may be legal for a board of directors to do and perform under the Revised Statutes aforesaid.

Seventh. This association shall continue for the period of twenty years from the date of the execution of its organization certificate, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These articles of association may be changed or amended at any time by shareholders owning a majority of the stock of the association in any manner not inconsistent with law; and the board of directors, or any three shareholders, may call a meeting of the shareholders for this or any other purpose not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city, or

county where the bank is located, or by mailing to each shareholder notice in writing thirty days before the time fixed for the meeting.

In witness whereof we have hereunto set our hands this ——— day of ———.

——— ———. ——— ———.
——— ———. ——— ———.
——— ———. ——— ———.
——— ———. ——— ———.
——— ———. ——— ———.

ORGANIZATION CERTIFICATE.

We, the undersigned directors of the ——— ———, having been duly authorized by the owners of two-thirds of its capital stock to change and convert said bank into a national banking association, and to make the necessary organization certificate, under the provisions of section 5154 of the Revised Statutes of the United States, or of acts amendatory thereof, do sign and execute the following organization certificate, which we hereby declare we are authorized to make by the owners of two-thirds of the capital stock of the said State bank.

First. The title of this association shall be "The ——— ———."

Second. The said association shall be located and continued in the ——— of ———, county of ———, and State ———, where its operations of discount and deposit are to be carried on.

Third. The capital stock of this association shall be ——— dollars ($———), divided into ——— shares of ——— dollars each, as it is now divided in the said State bank.

Fourth. The name and residence of each of the stockholders of the said State bank, which is to become a national bank under the provisions of the Revised Statutes aforesaid, and the number of shares of ——— dollars each held by each stockholder are as follows:

Name.	Residence.	Number of shares.

Fifth. The certificate is made in order that the said State bank and the stockholders thereof may avail themselves of the advantages of the aforesaid Revised Statutes, and that the said State bank may be changed and converted into a national banking association, under the foregoing title.

In witness whereof we have hereunto set our hands this ——— day of ———.

——— ———. ——— ———.
——— ———. ——— ———.
——— ———. ——— ———.
——— ———. ——— ———.
——— ———. ——— ———.

The signatures of a majority of directors required.

STATE OF ———,

County of ———, *ss.:*

Before the undersigned a ——— of ———, personally appeared ———, ———, ———, ———, ———, directors of the aforesaid State bank, to me well known, who severally acknowledged that they executed the foregoing certificate for the purpose therein mentioned.

Witness my hand and seal of office this ——— day ———.

——— ———.

[OFFICIAL SEAL OF OFFICER.] ——— ———.

CERTIFICATE RELATIVE TO PAYMENT OF CAPITAL STOCK OF STATE BANK CONVERTING INTO NATIONAL BANK.

It is hereby certified that The ——— Bank of ———, which is to be converted into "The ——— National ——— Bank of ———," in conformity with the provisions of section 5154 of the Revised Statutes of the United States, authorizing the conversion of "any bank incorporated by special law or any banking institution organized under a general law of any State," has a paid in and unimpaired capital of $———.

——— ———,
President.
or
——— ———,
Cashier.

STATE OF ———,
County of ———, *ss.:*

Subscribed and sworn to before the undersigned, a ——— of the said county, this ——— day of ———, 190—.

——— ———,
[OFFICIAL SEAL OF OFFICER.] [office] —————

All other papers and proceedings will be similar to those required of associations primarily organized under the national banking laws.

EXTENSION OF CORPORATE EXISTENCE.

The act of Congress approved July 12, 1882, empowers the extension of the corporate existence of national banking associations whose periods of succession are about to expire. Section 5136 provides that all associations organized under it shall have succession for twenty years from the date of the execution of their organization certificates.

The officers of a national bank can therefore ascertain the date of the expiration of the corporate existence of the association from the date of the last acknowledgment in the organization certificate. If the certificate has been lost or the date is uncertain, information can be obtained upon application to the Comptroller. Under the act of July 12, 1882, and the regulations of the Comptroller's office, shareholders owning at least two-thirds of capital stock are authorized to give their written consent to extension of corporate existence at any time within two years prior to the expiration of existing charter, and the necessary blanks and instructions will be sent a sufficient time in advance to enable them to do so. While no meeting of shareholders is necessary, the law only requiring the written consent

of the owners of two-thirds of the capital stock, there is no legal objection to the holding of a meeting of shareholders for the purpose of considering the propriety of extending charter. The formal amendment, certificate relative thereto, and request for approval to be executed and filed with the Comptroller are as follows:

AMENDMENT OF ARTICLES OF ASSOCIATION OF NATIONAL BANK.

In accordance with and in pursuance of the provisions of "An act to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12, 1882, we, the undersigned, shareholders of "The ——— ———," located at ——— in the county of ——— and State of ———, owning the number of shares of the capital stock of said association set opposite our respective names, aggregating not less than two-thirds of the stock of said association, do hereby consent and agree that the ——— article of the articles of association of said national banking association be, and is hereby, amended to read as follows:

"This association shall continue until close of business on ——— ———, 19—, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law."

In witness whereof, we, the undersigned, have hereto set our hands.

Date of signing.	Signature of shareholder.	Address.	Signature of proxy.	Number of shares.

CERTIFICATE.

TO THE COMPTROLLER OF THE CURRENCY.

Washington, D.C.

SIR: In pursuance of the provisions of "An act to enable banking associations to extend their corporate existence, and for other purposes," approved July 12, 1882, I hereby certify that shareholders owning not less than two-thirds of the capital stock of "The ——— ———" have consented in writing to the extension of the charter of said association; that the signatures to the attached amendment of the articles of association, executed in duplicate, are the true and correct signatures of said shareholders, or of their lawfully appointed attorneys, and that one of the instruments, in all respects like the other, is on file in the bank.

The foregoing certificate is made under seal of the association in accordance with a resolution of the board of directors adopted at a meeting held on the ——— day of———, 190—, in which the president or cashier, was also authorized to make an application for the approval of the amended articles of association, a copy of which resolution has been recorded on the minute book of the bank.

[SEAL OF BANK.] ——— ———,

President or Cashier.

(The above certificate should not be made prior to date on which the amendment is last signed.)

REQUEST FOR APPROVAL.

The Comptroller of the Currency is hereby requested to approve the foregoing amendment of the articles of association of said bank, extending its corporate existence for twenty years, pursuant to the act of Congress entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12, 1882.

——— ———,

President or Cashier.

PROXY FOR USE IN EXTENDING CORPORATE EXISTENCE OF NATIONAL BANK.

Know all men by these presents, that I, ——— ———, of ———, hereby constitute and appoint irrevocably ——— ——— my true and lawful attorney, for me and in my name and stead to sign all necessary papers in connection with the extension of the corporate existnece of the ——— ———, under the act of Congress approved July 12, 1882, or any amendment of said act, and I hereby consent that the ——— article of the articles of association of the ——— ———, be so amended as to read as follows:

"This association shall continue until close of business on ———, unless sooner placed in voluntary liquidation, by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law."

I further grant unto my said attorney full power and authority to act in and concerning the premises as fully and effectually as I might do if personally present.

In witness whereof I have hereunto set my hand this ——— day of ———, in the year one thousand nine hundred and ———.

——— ———.

Signed in presence of two witnesses:

——— ———.

——— ———.

AUTHORITY OF REPRESENTATIVE OF OTHER CORPORATION CONSENTING TO EXTENSION CORPORATE EXISTENCE OF NATIONAL BANK.

——— ———,

——— ———.

At a meeting of the ——— of the ——— of ———, held on the ——— day of ———, it was voted that ——— ——— be, and he is hereby appointed irrevocably as its attorney, with power of substitution, to consent to and sign, in its behalf, the amendment of the ——— article of the articles of association of The ——— National ——— Bank ———, said amendment reading as follows:

"This association shall continue until close of business on ———, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law."

A true copy from the records.

Attest: ——— ———. [Affix seal.]

EXTENSION OF CHARTER.

[Letter —; series of 1902.]

Order for plates and circulation.

Charter No. ——.

——— NATIONAL ——— BANK OF ———,

——— ———.

TO THE COMPTROLLER OF THE CURRENCY,

SIR: As the corporate existence of this bank is to be legally extended for twenty years, you are requested to have new plates engraved, the cost

to be paid upon demand, and circulating notes printed therefrom as follows:

Cost of plates.	Number of shares ordered.	Denominations on sheets.	Value per sheet.	Amount of circulation.
$75.......		$5, $5, $5, $5..................................	$20......	$
75.......		$10, $10, $10, $20..............................	50......	
50.......		$50, $100.......................................	150......	
		Total	....	$

Respectfully,

——— ———.

Cashier.

NOTE.— The act of July 12, 1882, requires that circulating notes issued to banks subsequent to extension of corporate existence shall bear such devices as shall make them readily distinguishable from prior issues. Lawful money must be deposited within three years from date of extension to redeem old issues outstanding. Unless the deposit is to be made immediately the foregoing order should be limited in amount to 50 per cent of the par value of bonds on deposit with the Treasurer of the United States; otherwise the full amount of circulation to which the bank is entitled should be ordered. The act of March 14, 1900, limits the issue of circulating notes of the denomination of $5 to one-third of the total issues of each bank. If, therefore, notes of that denomination are desired, it will be necessary to order at least two plates.

This order should accompany the amendment providing for the extension of the corporate existence of the association.

The following instructions should be strictly observed: The date on which each shareholder or his attorney signs the amendment should be entered in the column for that purpose. An attorney representing several shareholders need sign but once on a page, if the names of shareholders are bracketed. Residence and number of shares of each shareholder consenting to the extension must be given.

When the owners of at least two-thirds of the stock have signed the amendment, in person or by proxy, a meeting of directors should be held and a resolution adopted directing the president or cashier to make the necessary certification to the Comptroller of the Currency, and request the approval of the amendment as provided by law. The amendment, with appended certificate, and request for approval, should be transmitted to the Comptroller at least two months prior to the expiration of the corporate existence of the bank in order to allow sufficient time to cause the special examination to be made as required by law. If any shares of stock standing in

the name of administrators, executors, trustees, or guardians are represented, certified copies of the legal appointment of such administrators, executors, trustees, or guardians should be furnished to the bank unless the directors are satisfied of the existence of authority of such administrators, etc., to sign the amendment. In order that stock held by an assignee may be represented, the shares must have been formally transferred to him on the books of the bank. If the amendment is signed by attorneys acting for shareholders or by an officer of another corporation, properly executed powers of attorney or other authority should be required and retained for the files of the bank.

Subsequent to the receipt of extension papers in due form, the Comptroller will order the special examination required by law, the expense of which must be paid by the bank. If the report of the examiner is favorable, the Comptroller will, at the date of expiration of existing charter, issue the certificate of extension.

The law requires that circulating notes issued to the bank after the date at which the period of succession begins shall be of different devices from those issued before. This necessitates the procuring of new plates, which are prepared at the expense of the bank. A blank to enable a bank to order the engraving of plates and the printing of new circulation will be furnished. The order should be transmitted with the amendment.

No transfer of bonds is necessary, as the extended association is, in all respects, the same as before extension. The new circulating notes will be issued as the old issues are received for redemption, until the end of three years from the date of extension, when lawful money must be deposited for the redemption of such portion of the old circulation as may then remain outstanding. The old issues may be provided for by depositing lawful money in full, or in installments, at any time prior to the expiration of the three-year period.

OFFICERS' BONDS.

When the corporate existence of a national bank is extended, the renewal of bonds of officers and employees should have attention.

SHAREHOLDERS NOT DESIRING TO EXTEND THE CORPORATE EXISTENCE OF THE ASSOCIATION.

Some shareholders may not assent to the extension, and may wish to withdraw from the association. Section 5 of the act of July 12, 1882, provides what may be done in such cases, as follows:

That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if such reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder, from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section.

RE-EXTENSION OF CORPORATE EXISTENCE.

The act of Congress approved April 12, 1902, provides that the Comptroller of the Currency may, in the manner provided by, and under the conditions and limitations of the act of July 12, 1882, extend for a further period of twenty years the charter of any national banking association extended under said act which shall desire to continue its existence after the expiration of its charter. The form of amendment and certificate follows:

RE-EXTENSION OF CHARTER — AMENDMENT OF ARTICLES OF ASSOCIATION OF NATIONAL BANK.

In accordance with and in pursuance of the provisions of "An act to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12, 1882, and the amendment approved April 12, 1902, we, the undersigned, shareholders of "The ——— ———," located at ——— in the county of ——— and State of ———, owning the number of shares of the capital stock of said association set opposite our respective names, aggregating not less than two-thrids of the stock of said association, do hereby consent and agree that the ——— article of the articles of association of said national banking association be, and is hereby, amended to read as follows:

"This association shall continue until close of business on ——— ———, 19—, unless sooner placed in voluntary liquidation by the act of its share-

holders owning at least two-thirds of its stock, or otherwise dissolved by authority of law."

In witness whereof we, the undersigned, have hereto set our hands.

Date of signing.	Signature of stockholder.	Address.	Signature of proxy.	No. of shares.

———, ———, *190—*.

To the COMPTROLLER OF THE CURRENCY,

Washington, D. C.

SIR: In pursuance of the provisions of "An act to enable national banking associations to extend their corporate existence, and for other purposes," approved July 12, 1882, and the amendment approved April 12, 1902, I hereby certify that shareholders owning not less than two-thirds of the capital stock of "The ——— ———," have consented in writing to the re-extention of the charter of said association; that the signatures to the attached amendment of the articles of association, executed in duplicate, are the true and correct signatures of said shareholders, or of their lawfully appointed attorneys, and that one of the instruments, in all respects like the other, is on file in the bank.

The foregoing certificate is made under seal of the association in accordance with a resolution of the board of directors adopted at a meeting held on the ——— day of ———, 190—, in which the president, or cashier, was also authorized to make an application for the approval of the amended articles of association, a copy of which resolution has been recorded on the minute book of the bank.

[SEAL OF BANK.]

——— ———,

President or Cashier.

(The above certificate should not be made prior to date on which the amendment is last signed.)

The Comptroller of the Currency is hereby requested to approve the foregoing amendment of the articles of association of said bank, re-extending its corporate existence for twenty years, pursuant to the act of Congress entitled "An act to provide for the extension of the charters of national banks," approved April 12, 1902.

[SEAL OF BANK.]

——— ———,

President or Cashier.

The other forms are similar to those used in connection with the original or first extension of charter.

AMENDMENTS.

Section 5139 of the Revised Statutes provides that no change shall be made in the articles of association of a national bank by which the rights, remedies, or security of the existing creditors of the association shall be impaired; which, by im-

plication, authorizes amendments not contravening the rights of creditors. As a matter of fact, the national banking law specifically provides for amendments of the articles of association, changing corporate title, location of bank, increasing and reducing capital stock, and extension of corporate existence. Amendment of the last named character requires the written consent of shareholders owning two-thirds of the stock of an association, but the other changes require authorization by a two-thirds stock vote at a meeting of shareholders called for the purpose.

Ordinarily a provision is written into the articles of association of national banks authorizing amendment, in any respect not conflicting with law, by a majority stock vote. Where this provision exists, the right is recognized to amend the articles, by such a vote, relating to the number of directors, the time of holding annual elections (in the month of January), the number of directors required to constitute a quorum, etc.

In the interest of banks concerned, and in accordance with the rulings of the office, a proposition to amend the articles of association of a bank, in any particular, should be submitted to the Comptroller of the Currency, for approval and specific instructions, in advance of action by stockholders. In this connection attention is called to comments following "Notice for shareholders' meeting," appearing on page 712.

CHANGE OF NAME AND LOCATION.

A national banking association may, with the consent of the Comptroller of the Currency and by the vote of the shareholders owning at least two-thirds of the stock of the association, change its name or place where its operations are carried on to any other locality in the same State not more than 30 miles distant.

When an association desires to change its title or location the proposition should be submitted to the Comptroller of the Currency for consideration, and when approved a meeting of shareholders called that the required vote may be obtained.

Due notice of the meeting must be given and a certified copy of the resolution, under seal of the bank, sent to the

Comptroller of the Currency, accompanied by a copy of the resolution of the board of directors authorizing the Treasurer of the United States to assign to the bank under its new title the bonds held by him as security for circulation, together with an order for plate or plates and circulation to conform to change of title, etc. No circulating notes of a bank under its original title will be issued from this office subsequent to date of approval of change of corporate name.

No change of name or location is valid until the Comptroller's certificate of approval is issued. (See act of Congress approved May 1, 1886, to be found in the national-bank act.)

LIQUIDATION.

A national banking association may, under section 5220, be placed in voluntary liquidation by a vote of the owners of two-thirds of the stock. Before calling a meeting of shareholders, however, for the purpose of voting upon the proposition, application should be made to the Comptroller for his approval and the necessary blanks and instructions.

Notice of the meeting as herein elsewhere provided should be given to the shareholders at which it is proposed to take the vote required. (See notice for shareholders' meeting.)

When a meeting has been held and a resolution adopted by the required vote, it is the duty of the board of directors to cause notice of the fact to be certified, under seal of the association, to the Comptroller of the Currency by the president or cashier, and publication thereof to be made for a period of two months in a newspaper published in the city of New York and also in the place in which the association is located; or if no newspaper is published in such place then in a newspaper published nearest thereto, that the association is closing up its affairs, and notifying note holders and other creditors to present the notes and other claims against the association for payment. (See sec. 5221.)

When an association, with the approval of the Comptroller, goes into liquidation, its affairs pass into the hands of its shareholders for such legal disposition as may be deemed proper; and, unless a liquidating agent is elected by the shareholders, the settlement of the affairs of the bank would appear to devolve upon the directors, who will be at liberty to continue

one or more of the officers, or, in lieu thereof, to appoint an agent for the purpose of conducting liquidating proceedings.

RESOLUTION FOR VOLUNTARY LIQUIDATION.

No. ——.

THE —— NATIONAL —— BANK OF ——,

(Date.) ——, ——.

At a meeting of the shareholders of the —— National —— Bank of ——, held on ——, thirty days' notice of the proposed business having been given, at which shareholders were present, in person and by proxy, representing —— shares of the stock of this association, it was

Resolved, That "The —— National —— Bank ——" be placed in voluntary liquidation, under the provisions of section 5220 and 5221, United States Revised Statutes, to take effect ——.

The foregoing resolution was adopted by the following vote, representing two-thirds of the capital stock of the association:

Name of shareholder.	Residence.	Name of proxy.	Number of shares.

Stock voted against resolution.

Name of shareholder.	Residence.	Name of proxy.	Number of shares.

Stock not represented at meeting.

Name of shareholder.	Residence.	Number of shares.

Total number of shares voted in favor of the resolution, ——.
Total number of shares voted against the resolution, ——.
Total number of shares represented at the meeting, ——.
Total number of shares not represented at the meeting, ——.
Total number of shares of capital stock, ——.

I hereby certify that the foregoing is a true and correct report of the vote and of the resolution adopted at a meeting of the shareholders of this bank held on ———.

[SEAL OF BANK.] ——— ———,

President or Cashier.

Subscribed and sworn to before me this —— day of ———, A .D. ——.

[SEAL OF NOTARY.] ——— ———,

Notary Public.

NOTICE.

Form of notice to be published two months, from date on which resolution to liquidate takes effect, in a newspaper in the city of New York and in one published in the place in which the bank is located. When publication has been made as required by section 5221 of the United States Revised Statutes, affidavit of the publisher should be sent to the Comptroller of the Currency:

The ——— National ——— Bank ———, located at ———, in the State of ———, is closing its affairs. All note holders and other creditors of the association are therefore hereby notified to present the notes and other claims for payment.

——— ———,

President or Cashier.

Dated, ——— ———, 190—.

LIQUIDATION FOR CONSOLIDATION.

The only reference to the subject of consolidation in the national bank act appears in the act approved July 14, 1870 (U. S. Rev. Stat., sec. 5223), and is to the effect that any association closing its affairs (by voluntary liquidation), under authority of law, for the purpose of consolidating with another association, shall not be required to deposit lawful money to provide for its outstanding circulation, but its assets and liabilities shall be reported by the association with which it is in process of consolidation.

By implication, this provision would appear to authorize the assignment of bonds on deposit with the Treasurer of the United States to secure the circulation of the liquidating bank to the absorbing association, and require the maintenance of a redemption fund for the outstanding issues of the bank which has gone into liquidation. With the redemption of issues of the closed bank would follow the issue of a like amount of notes of the absorbing association. As a matter

of fact, this permissive feature in full has never been availed of by an association absorbing the business of one placed in liquidation, as it has been found more advantageous to deposit lawful money to redeem the notes of the liquidated bank and to simultaneously issue new notes of their own on bonds deposited.

In case the absorbing bank has not a sufficient stock of incomplete currency in the vaults of this office, an order for the printing of the necessary supply will have prompt attention. As an association placed in voluntary liquidation has six months within which to deposit lawful money to redeem its outstanding circulation, deposits may be made in installments if desired, which will enable the transfer of a like amount of bonds and the issue thereon of a corresponding amount of circulating notes to the absorbing association.

Consolidation can only be effected by pursuing one of the following methods:

First. Without an increase of capital the directors of the absorbing bank may enter into a contract with the directors or agents of the liquidated association to purchase its assets, assume liabilities to depositors and other creditors, and to pay the value of assets purchased in excess of liabilities to depositors and other creditors, less any expenses incident to liquidation.

Second. By increasing the capital stock of the absorbing bank to an amount equal to that of the liquidated bank, the additional shares may be sold to stockholders of the latter, consent thereto having been previously obtained from shareholders of the absorbing association. As the law is construed as requiring the payment of capital, original or on account of increase, in money, and not in "notes or like evidence of debt," the right to accept assets representing stock of the closed bank, and to issue therefor certificates in the continuing bank is not recognized. In every such case shareholders of the closed association are paid the value of their stock either in cash or cashier's check, the proceeds being available in payment of shares to which they may be entitled in the absorbing corporation.

The pre-emptive right of shareholders to participate pro rata in an increase of capital is well recognized, and it is gen-

erally incorporated in the articles of association. In order to avoid possible litigation, the course usually pursued is to secure waivers of right to participate from shareholders of record. Provision having thus been made for shareholders of the closed bank, the directors of the continuing bank are at liberty to contract for the purchase of assets and the assumption of liabilities to depositors and other creditors of the liquidated bank.

Third. The remaining method, and one occasionally pursued, is to place the interested banks in voluntary liquidation, under section 5220 of the United States Revised Statutes, organize anew under a different corporate title, and acquire, in the manner hereinbefore outlined, the business of the liquidating associations. This method enables the incorporators to place the stock as they may determine.

LIQUIDATION AT EXPIRATION OF CHARTER.

Section 7 of the act of July 12, 1882, provides that national banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections 5221 and 5222 of the Revised Statutes in the same manner as if the shareholders had voted to go into liquidation, as provided in section 5220 of the Revised Statutes; and the provisions of sections 5224 and 5225 of the Revised Statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such associations is extended for the sole purpose of liquidating their affairs until such affairs are finally closed.

While, under the above-mentioned act, no meeting of shareholders is necessary for the purpose of voting on the question of expiration of charter (the corporate existence expiring by limitation, if not extended as provided by law), it would seem to be proper to call the shareholders together on or before date of expiration of charter, for the exchange of views and the taking of such action as may be deemed advisable with regard to closing the affairs of the bank after the charter has expired.

If the charter of a bank is permitted to expire, the president

or cashier should execute and forward to the Comptroller of the Currency, certificate to that effect, in the following form:

CERTIFICATE OF EXPIRATION OF CORPORATE EXISTENCE.

——— NATIONAL ——— BANK ———,
———, ———, ——.

To the COMPTROLLER OF THE CURRENCY,
Washington.

SIR: It is hereby certified that the corporate existence of ———, located at ———, in the State of ———, having expired at close of business on the ——— day of ———, ——, the bank is now closing its affairs under the provisions of section 7 of the act of July 12, 1882.

In testimony whereof I have, by instruction of the board of directors of said association, hereto subscribed my name and affixed the seal of said association at ———, aforesaid, the day and year above written.

[SEAL OF BANK.] ——— ———,
President or Cashier.

NOTICE.

The ——— National ——— Bank ———, located at ———, in the State of ———, is closing up its affairs, its corporate existence having expired at close of business on the ——— day of ———, ———. All note holders and others, creditors of said association, are therefore hereby notified to present the notes and other claims against the association for payment.

——— ———,
President or Cashier.

Dated ——— ——.

NOTE.— The foregoing notice to be published for a period of two months in a newspaper in the city of New York, and also in a newspaper published in the place in which the bank is located. (See section 5221, Revised Statutes.) A certificate of the publisher that the required publication has been made, together with a slip containing notice from one issue of each paper, should be sent to the Comptroller of the Currency.

The settlement of the affairs of a bank, at expiration of charter, should be effected in the same manner as in the case of liquidation by resolution of shareholders.

NOTICE FOR SHAREHOLDERS' MEETING.

No notice of an annual meeting is required when the time and place are provided for in the articles of association (unless the by-laws make a notice necessary) if at said meeting the election of directors only is to take place.

For an annual meeting, at which business of an unusual or extraordinary character, such as the amendment of articles of association, is to be considered, and for all special meetings of shareholders, notice should be given as required by the by-laws and articles of association of the bank. If no provision is

made therein, thirty days' notice is required. The notice, a copy of which should accompany the papers transmitted to the Comptroller, showing date of issue, should state clearly (1) the place for holding the meeting, (2) the time, and (3) the business proposed to be transacted.

BRANCH BANKS.

The only provision in the national bank act relating to branch banks is found in section 5155, United States Revised Statutes, and reads as follows:

> It shall be lawful for any bank or banking association, organized under State laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain.

The granting of this special privilege to State banks and the absence of any similar provision in the law with respect to banks of primary organization have always been construed by the Comptroller to imply that banks of the latter class were not permitted to have branches. The section cited absolutely restricts branch banks of converted associations to such as have a definite proportion of the capital of the parent bank assigned to them, and it is not to be assumed that the law contemplated that associations of primary organization should be permitted to assign any portion of their capital to and operate branches.

This fact is further to be inferred from section 5138, United States Revised Statutes, which prohibits the formation of associations with less capital than $200,000 in cities of population exceeding 50,000, and with less than a specified capital in places with population less than 50,000.

To permit the establishment of branch banks would not only render possible an evasion of the provisions of section 5138, but tend to discourage the organization of banking associations which, in the absence of such branches, might be formed.

Section 5134 provides in part that the organization certificate of a national bank shall show "the place where its operations of discount and deposit are to be carried on," and section 5190 that "the usual business of each national banking association shall be transacted at an office or banking house (not

offices or banking houses) located in the place (not places) specified in its organization certificate."

The word "place" and "at an office or banking house" have always been construed by the Comptroller to mean the legal domicile of the corporation, of which it can have but one, and this construction is sustained by the Solicitor of the Treasury in an opinion rendered August 10, 1899, on the question of the right of a national bank to establish and maintain an auxiliary cash room at some point distant from its banking house, for the purpose of receiving deposits and paying checks. The Solicitor says:

This section (5190, U. S. Rev. Stat.) contemplates that the usual business of a national banking association shall be transacted at one office and banking house, and as receiving deposits and paying checks belong to the "usual business" of a bank, I am of the opinion that the statute does not authorize the establishment of an auxiliary cash room in a different part of the city for the purpose proposed. Besides, it may be observed that if a national banking association can lawfully establish and maintain a separate office for receiving deposits and paying checks, it could as well establish as many of such auxiliary cash rooms in the city of its corporate residence as its business might require; and, indeed, the entire business of the bank may be parceled out and conducted in the same way all over the city.

The Supreme Court of the United States, in the case of Armstrong v. Second National Bank of Springfield (38 Fed. Rep., 886), involving, among other things, the question of the right of a national bank to cash a check elsewhere than at its banking house, held that —

Under this section (5190) it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than at its office or banking house.

If, therefore, it is unlawful for a national bank to cash a check elsewhere than at its banking house, it is likewise unlawful for it to discount notes or to receive deposits elsewhere, for one is as much a part of the "usual business" of a bank as the other. While it is obviously impossible for a bank to transact its entire business within the four walls of any single building it is not held that the law contemplates that the "entire business," as distinguished from its "usual business," shall be transacted in its banking house.

In the case of The Merchants National Bank of Boston v. The State National Bank (10 Wall., 604), it was held in this connection that —

The provision requiring the "usual business" of the association to be transacted "at an office or banking house specified in its organization cer-

tificate" must be construed reasonably, and a part of the legitimate business of the association which can not be transacted at the banking house may be done elsewhere.

The question involved in this case was the right of the bank's officers to purchase gold elsewhere than at its banking house, and the court held that—

> The gold must necessarily have been bought, if at all, at the buying or selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it.

The "legitimate business" of a bank, therefore, which a reasonable construction of the law would permit to be done elsewhere than at its banking house would seem to be restricted to transactions similar in character to that involved in the decision quoted, and not the ordinary and usual business of receiving deposits, and cashing checks.

While the national-bank act does not in express terms prohibit the establishment and maintenance of branch banks or agencies by associations of primary organization, the implication to that effect is clear, and the courts have held that what is implied is as effective as that which is expressed.

That the act does not contemplate the operation of branch banks by national banks of primary organization is evidenced by the fact that in 1892 a special act was approved authorizing the operation of a branch by a Chicago national bank on the World's Fair grounds. In 1901 similar legislation was enacted by Congress in connection with the Louisiana Purchase Exposition, held in 1904.

SAVINGS DEPARTMENT.

There does not appear to be anything in the national-bank act which authorizes or prohibits the operation of a savings department by a national bank.

Many national banks pay interest on deposits, the receipt of such deposit being evidenced either by entries in the pass books of the depositors or by issue of certificates of deposit, as may be preferred. Deposits of this character must be shown in the reports of the bank and loaned in the manner provided by the national bank act. This would prevent a national bank from accepting real-estate collaterals which are deemed judicious for savings banks. All deposits, however,

in a national bank are payable on demand, except when made the subject of special contract, but the right of a bank to make a contract of that nature is a matter for judicial determination.

The expediency of a national banking association, organized for the purpose of doing a business of discount and deposit, engaging in the business of a savings bank is one for consideration and determination by the board of directors.

INFORMATION

RESPECTING UNITED STATES COIN, PAPER CURRENCY AND PRODUCTION OF PRECIOUS METALS, ETC.

[The information here obtained is taken from the United States Treasury Department Circular No. 72, which was authorized and directed to be issued by the Hon. Leslie M. Shaw, Secretary Treasury.]

SUMMARY OF MONETARY EVENTS SINCE 1786.

1786.— Establishment of the double standard in the United States with a ratio of 1 to 15.25; that is, on the basis of 123.134 grains of fine gold for the half eagle, or $5 piece, and 375.64 grains of fine silver for the dollar, without any actual coinage.

1792.— Adoption of the ratio of 1 to 15 and establishment of a mint with free and gratuitous coinage in the United States; the silver dollar equal to 371¼ grains fine, the eagle to 247½ grains fine.

1803.— Establishment of the double standard in France on the basis of the ratio of 1 to 15½, notwithstanding the fact that the market ratio was then about 1 to 15.

1810.— Introduction of the silver standard in Russia on the basis of the ruble of 17.99 grams of fine silver, followed in 1871 by the coinage of imperials, or gold pieces of 5 rubles, of 5.998 grams; therefore, with a ratio of 1 to 15. This ratio was changed by the increase of the imperial to 5 rubles 15 copecks, and later to 1 to 15.45.

1815.— Great depreciation of paper money in England, reaching 26½ per cent. in May. Course of gold, £5 6s., and of silver, 71½d. per ounce standard. In December the loss was only 6 per cent; gold at this period was quoted at £4 3s., and silver at 64d.

1816.— Abolition of the double standard in England, which had had as its basis the ratio of 1 to 15.21, and adoption of the gold standard on the basis of the pound sterling at 7.322 grams fine in weight.

Coinage of divisional money at the rate of 66d. per ounce. Extreme prices, £4 2s. for gold and 64d. for silver; in January, £3 18s. 6d., and $59\frac{1}{4}$d. in December.

1816.— Substitution for the ratio of 1 to 15.5 in Holland, established by a rather confused coinage, of the ratio of 1 to $15\frac{7}{8}$.

1819.—Abolition of forced currency in England. Price of gold, £3 17s. $10\frac{1}{2}$d., and of silver, 62d.[1] per ounce in October, against £4 1s. 6d. and 67d. in February.

1832.— Introduction of the monetary system of France in Belgium, with a decree providing for the coinage of pieces of 20 and 40 francs, which, however, were not stamped. Silver, $59\frac{3}{4}$d.

1834.— Substitution of the ratio of 1 to 16 for that of 1 to 15 in the United States by reducing the weight of the eagle, ten-dollar gold piece, from 270 grains to 258 grains.

In 1837 the fineness of the United States gold coins was raised from .899,225 to .900, and the silver coins from .892,4 to .900, giving a ratio of 1 to 15.988 and fixing the standard weight of the silver dollar at $412\frac{1}{2}$ grains. Silver, $59\frac{15}{16}$d.

1835.—Introduction of the company rupee, a piece of silver weighing 165 grains fine, in India in place of the sicca rupee. Creation of a trade coin — the mohur, or piece of 15 rupees — containing 165 grains of fine gold. Silver, $59\frac{11}{16}$d.

1844.—Introduction of the double standard in Turkey, with the ratio of 1 to 15.10. Silver, $59\frac{1}{2}$d.

1847.— Abolition of the double standard in Holland by the introduction of the silver standard on the basis of a 1-florin piece 0.945 grams fine, the coinage of which had already been decreed in 1839. Silver, $59\frac{11}{16}$d.

1847.— Discovery of the gold mines in California.

1848.— Coinage in Belgium of pieces of 10 and 25 francs in gold, a shade too light. These pieces were demonetized and withdrawn from circulation in 1884. Silver, $59\frac{1}{2}$d.

[1] The price of silver given hereafter represents the average rate per ounce standard — that is, the mean between the highest price and the lowest price quoted during the year.

1848.— Replacing the ratio of 1 to 16 in Spain, which had been in force since 1786, by that of 1 to 15.77.

1850.— Introduction of the French monetary system in Switzerland without any actual coinage of gold pieces. Silver, $60\frac{1}{16}$d.

1851.— Discovery of the gold mines of Australia.

1853.— Lowering of the weight of silver pieces of less value than \$1 to the extent of 7 per cent in the United States, and limitation of their legal-tender power to \$5. Silver, $61\frac{1}{2}$d.

1853.— Maximum of the production of gold reached in California when it amounted to \$65,000,000.

1854.— Introduction of the gold standard in Portugal on the basis of the crown of 16.257 grams fine. Before this period the country had the silver standard, with a rather large circulation of gold coins stamped, on the basis of 1 to $15\frac{1}{2}$ in 1835 and 1 to $16\frac{1}{2}$ in 1847. Silver, $61\frac{1}{2}$d.

1854.— Modification of the ratio of 1 to 15.77 in Spain by raising it to 1 to 15.48, and by lowering the piaster from 23.49 grams to 23.36 grams fine.

1854.— Introduction of the silver standard, as it existed in the mother country, in Java, in place of the ideal Javanese money, and coinage of colonial silver pieces.

1857.—Conclusion of a monetary treaty between Austria and the German States, in accordance with which 1 pound of fine silver (one-half a kilogram) was stamped into 30 thalers or $52\frac{1}{2}$ florins of south Germany, or 45 Austrian florins, resulting in 1 thaler equaling $1\frac{3}{4}$ German florins or $1\frac{1}{2}$ Austrian florins. Silver, $61\frac{3}{4}$d.

1861.— Law decreeing the coinage of gold pieces of 10 and 20 francs exactly equal to French coins of the same denomination in Belgium. Silver, $61\frac{3}{4}$d.

1862.— Adoption of the French Monetary system by Italy. Silver, $61\frac{7}{16}$d.

1865.— Formation of the Latin Union between France, Belgium, Switzerland, and Italy on the basis of a ratio of 1 to $15\frac{1}{2}$. Silver, $61\frac{1}{16}$d.

1868.— Adoption of the French monetary system by Roumania, with the exclusion of the 5-franc silver piece, which was, however, stamped in 1881 and 1883. Silver, $60\frac{1}{2}$d.

1868.— Admission of Greece into the Latin Union. The

definite and universal introduction of the French monetary system into the country was effected only in 1883.

1868.— Adoption of the French monetary system, with the peseta or franc as the unit, by Spain. The coinage of gold alphonses d'or of 25 pesetas was made only in 1876.

1871.— Replacing of the silver standard in Germany by the gold standard. Coinage in 1873 of gold pieces of 5, 10, and 20 mark pieces, the latter weighing 7.168 grams fine. Silver, 60½d.

1871.— Establishment of the double standard in Japan with the ratio of 1 to 16.17 by the coinage of the gold yen of 1.667 grams and of the silver yen of 26.956 grams, both with a fineness of .900.

1873.— Increase of the intrinsic value of the subsidiary coins of the United States. Replacing of the double standard by the gold standard. Reduction of the cost of coinage of gold to one-fifth per cent, the total abolition of which charge was decreed in 1875. Creation of a trade dollar of 420 grains with a fineness of .900. Silver, 59¼d.

1873.— Suspension of the coinage of 5-franc pieces in Belgium.

1873.— Limitation of the coinage of 5-francs on individual account in France.

1873.— Suspension of the coinage of silver in Holland.

1873.— Formation of the Scandinavian Monetary Union. Replacing of the silver standard in Denmark, Sweden, and Norway by that of gold on the basis of the krone. Coinage of pieces of 10 and 20 kroner, the latter weighing 8.961 grams, with a fineness of .900.

1874.— Introduction of the system of contingents for the coinage of 5-franc silver pieces in the Latin Union. Silver, 58$\frac{5}{16}$d.

1875.— Suspension of the coinage of silver on individual account in Italy. Silver, 56¾d.

1875.— Suspension of the coinage of silver on account of the Dutch colonies.

1875.— Introduction of the double standard in Holland on the basis of the ratio of 1 to 15.62 by the creation of a gold piece of 10 florins, weighing 5.048 grams fine, with the maintenance of the suspension of the coinage of silver.

1876.— Great fluctuations in the price of silver, which declined to $46\frac{3}{4}$d., representing the ratio of 1 to 20.172, in July. Recovery, in December, to $58\frac{1}{2}$d. Average price, $52\frac{3}{4}$d.

1877.— Coinage of 5-franc silver pieces by Spain continued later, notwithstanding the decline of silver in the market. Silver, $54\frac{3}{4}$d.

1877.— Replacing of the double standard in Finland by that of gold on the basis of the mark or franc.

1878.— Act of United States Congress providing for the purchase, from time to time, of silver bullion, at the market price thereof, of not less than $2,000,000 worth per month as a minimum, nor more than $4,000,000 worth per month as a maximum, and its coinage as fast as purchased into silver dollars of $412\frac{1}{2}$ grains. The coinage of silver on private account prohibited. Silver, $52\frac{9}{16}$d.

1878.— Meeting of the first international monetary conference in Paris. Prolongation of the Latin Union to January 1, 1886.

1879.— Suspension of the sales of silver by Germany. Silver, $51\frac{1}{4}$d.

1881.— Second international monetary conference in Paris. Silver, $51\frac{11}{16}$d.

1885.— Introduction of the double standard in Egypt. Silver, $48\frac{5}{8}$d.

1885.— Prolongation of the Latin Union to January 1, 1891.

1886.— Great decline in the price of silver, which fell in August to 42d., representing a ratio of 1 to 22.5, and recovery in December to 46d. Modification of the coinage of gold and silver pieces in Russia. Silver, $45\frac{3}{8}$d.

1887.— Retirement of the trade dollars by the Government of the United States in February. Demonetization of the Spanish piasters, known as Ferdinand Carolus, whose reimbursement at the rate of 5 pesetas ended on March 11. New decline of silver in March to 44d., representing the ratio of 1 to 21.43. Silver, $44\frac{5}{8}$d.

1890.— United States — Repeal of the act of February 28, 1878, commonly known as Bland-Allison law, and substitution of authority for purchase of 4,500,000 fine ounces of silver each month, to be paid for by issue of Treasury notes payable in coin. (Act of July 14, 1890.) Demonetization of 25,000,-

000 lei in pieces of 5 lei in Roumania in consequence of the introduction of the gold standard by the law of October 27. Silver, $47\frac{13}{16}$d.

1891.— Introduction of the French monetary system in Tunis on the basis of the gold standard. Coinage of national gold coins and billon. Silver, $45\frac{1}{16}$d.

1892.— Replacing of the silver standard in Austria-Hungary by that of gold by the law of August 2. Coinage of pieces of 20 crowns, containing 6,098 grams fine. The crown equals one-half florin. Meeting of the third international monetary conference at Brussels. Production of gold reaches its maximum, varying between 675,000,000 and 734,000,000 francs. Silver, $39\frac{13}{16}$d.

1893.— Suspension of the coinage of silver in British India and of French trade dollars on individual account. Panic in the silver market in July in London, when the price fell below 30d., representing the ratio of 1 to 31.43. Repeal of the purchasing clause of the act of July 14, 1890, by the Congress of the United States.

1895.— Adoption of the gold standard by Chile.

1895.— Russia decides to coin 100,000,000 gold rubles in 1896.

1896.— Costa Rica adopts the gold standard.

1896.— Russia decides to resume specie payments.

1897.— Adoption of the gold standard by Russia and Japan.

1897.— Peru suspends the coinage of silver and prohibits its importation.

1899.— Adoption of the gold standard by India.

MONETARY SYSTEM OF THE UNITED STATES.

In 1786 the Congress of the Confederation chose as the monetary unit of the United States the dollar of 375.64 grains of pure silver. This unit had its origin in the Spanish piaster or milled dollar, which constituted the basis of the metallic circulation of the English colonies in America. It was never coined, there being at that time no mint in the United States.

The act of April 2, 1792, established the first monetary system of the United States. The bases of the system were: The gold dollar or unit, containing 24.75 grains of pure gold, and stamped in pieces of \$10, \$5, and $\$2\frac{1}{2}$, denominated, respectively,

eagles, half eagles, and quarter eagles; the silver dollar or unit, containing 371.25 grains of pure silver. A mint was established. The coinage was unlimited, and there was no mint charge. The ratio of gold to silver in coinage was 1 to 15. Both gold and silver were legal tender. The standard was double.

The act of 1792 undervalued gold, which was therefore exported. The act of June 28, 1834, was passed to remedy this, by changing the mint ratio between the metals to 1 to 16.002. This latter act fixed the weight of the gold dollar at 25.8 grains, but lowered the fineness from $0.916\frac{2}{3}$ to 0.899225. The fine weight of the gold dollar was thus reduced to 23.2 grains. The act of 1834 undervalued silver, as that of 1792 had undervalued gold, and silver was attracted to Europe by the more favorable ratio of 1 to $15\frac{1}{2}$. The act of January 18, 1837, was passed to make the fineness of the gold and silver coins uniform. The legal weight of the gold dollar was fixed at 25.8 grains and its fine weight at 23.22 grains. The fineness was therefore changed by this act to 0.900 and the ratio to 1 to 15.988+.

Silver continued to be exported. The act of February 21, 1853, reduced the weight of the silver coins of a denomination less than $1, which the acts of 1792 and 1837 had made exactly proportional to the weight of the silver dollar, and provided that they should be legal tender to the amount of only $5. Under the acts of 1792 and 1837 they had been full legal tender. By the act of 1853 the legal weight of the half dollar was reduced to 192 grains and that of the other fractions of a dollar in proportion. The coinage of the fractional parts of the dollar was reserved to the Government.

The act of February 12, 1873, provided that the unit of value of the United States should be the gold dollar of the standard weight of 25.8 grains, and that there should be coined besides the following gold coins: A quarter eagle, or $2\frac{1}{2}$-dollar piece; a 3-dollar piece; a half eagle, or 5-dollar piece; an eagle, or 10-dollar piece, and a double eagle, or 20-dollar piece, all of a standard weight proportional to that of the dollar piece. These coins were made legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided in the act for the single piece, and when reduced in weight they should be legal tender at a valuation in proportion to their actual weight. The silver

coins provided for by the act were a trade dollar, a half dollar, or 50-cent piece, a quarter dollar, and a 10-cent piece; the weight of the trade dollar to be 420 grains troy; the half dollar 12½ grams; the quarter dollar and the dime, respectively, one-half and one fifth of the weight of the half dollar. These silver coins were made legal tender at their nominal value for any amount not exceeding $5 in any one payment. The charge for converting standard gold bullion into coin was fixed at one-fifth of 1 per cent. Owners of silver bullion were allowed to deposit it at any mint of the United States, to be formed into bars or into trade dollars, and no deposit of silver for other coinage was to be received.

Section II of the joint resolution of July 22, 1876, recited that the trade dollar should not thereafter be legal tender, and that the Secretary of the Treasury should be authorized to limit the coinage of the same to an amount sufficient to meet the export demand for it. The act of February 19, 1887, retired the trade dollar and prohibited its coinage. That of September 26, 1890, discontinued the coinage of the 1-dollar and 3-dollar gold pieces.

The act of February 28, 1878, directed the coinage of silver dollars of the weight of 412½ grains troy, of standard silver, as provided in the act of January 18, 1837, and that such coins, with all standard silver dollars theretofore coined, should be legal tender at their nominal value for all debts and dues, public and private, except where otherwise expressly stipulated in the contract.

The Secretary of the Treasury was authorized and directed by the first section of the act to purchase from time to time silver bullion at the market price thereof, not less than $2,000,000 worth nor more than $4,000,000 worth per month, and to cause the same to be coined monthly, as fast as purchased, into such dollars. A subsequent act, that of July 14, 1890, enacted that the Secretary of the Treasury should purchase silver bullion to the aggregate amount of 4,500,000 ounces, or so much thereof as might be offered, each month, at the market price thereof, not exceeding $1 for 371.25 grains of pure silver, and to issue in payment thereof Treasury notes of the United States, such notes to be redeemable by the Government, on demand, in coin, and to be legal tender in pay-

ment of all debts, public and private, except where otherwise expressly stipulated in the contract. The act directed the Secretary of the Treasury to coin each month 2,000,000 ounces of the silver bullion purchased under the provisions of the act into standard silver dollars until the 1st day of July, 1891, and thereafter as much as might be necessary to provide for the redemption of the Treasury notes issued under the act. The purchasing clause of the act of July 14, 1890, was repealed by the act of November 1, 1893.

The act of June 9, 1879, made the subsidiary silver coins of the United States legal tender to the amount of $10. The minor coins are legal tender to the amount of 25 cents.

COINS OF THE UNITED STATES, AUTHORITY FOR COINING, AND CHANGES IN WEIGHT AND FINENESS AND AMOUNT COINED.

GOLD COINS.

DOUBLE EAGLE.

Authorized to be coined, act of March 3, 1849.
Weight, 516 grains; fineness, .900.
Total amount coined to June 30, 1900, $1,538,826,060.

EAGLE.

Authorized to be coined, act of April 2, 1792.
Weight, 270 grains; fineness, .916⅔.
Weight changed, act of June 28, 1834, to 258 grains.
Fineness changed, act of June 28, 1834, to .899,225.
Fineness changed, act of January 18, 1837, to .900.
Total amount coined to June 30, 1900, $319,061,160.

HALF EAGLE.

Authorized to be coined, act of April 2, 1792.
Weight, 135 grains; fineness, .916⅔.
Weight changed, act of June 28, 1834, to 129 grains.
Fineness changed, act of June 28, 1834, to .899,225.
Fineness changed, act of January 18, 1837, to .900.
Total amount coined to June 30, 1900, $259,066,545.

QUARTER EAGLE.

Authorized to be coined, act of April 2, 1792.
Weight, 67.5 grains; fineness, .916$\frac{2}{3}$.
Weight changed, act of June 28, 1834, to 64.5 grains.
Fineness changed, act of June 28, 1834, to .899,225.
Fineness changed, act of January 18, 1837, to .900.
Total amount coined to June 30, 1900, $29,015,635.

THREE-DOLLAR PIECE.

Authorized to be coined, act of February 21, 1853.
Weight, 77.4 grains; fineness, .900.
Total amount coined to September 26, 1890, $1,619,376.
Coinage discontinued, act of September 26, 1890.

ONE DOLLAR.

Authorized to be coined, act of March 3, 1849.
Weight, 25.8 grains; fineness, .900.
Total amount coined to September 26, 1890, $19,499,337.
Coinage discontinued, act of September 26, 1890.

SILVER COINS.

DOLLAR.

Authorized to be coined, act of April 2, 1792.
Weight, 416 grains; fineness, .892,4.
Weight changed, act of January 18, 1837, to 412$\frac{1}{2}$ grains.
Fineness changed, act of January 18, 1837, to .900.
Coinage discontinued, act of February 12, 1873.
Total amount coined to February 12, 1873, $8,031,238.
Coinage reauthorized, act of February 28, 1878.
Amount coined from March 1, 1878, to June 30, 1900, $498,496,215.
Total amount coined to June 30, 1900, $506,527,453.

LAFAYETTE DOLLAR.

Authorized to be coined by act of March 3, 1899.
Weight, 412$\frac{1}{2}$ grains; fineness, .900.
Total amount coined, $50,000.

TRADE DOLLAR.

Authorized to be coined, act of February 12, 1873.
Weight, 420 grains; fineness, .900.

Coinage limited to export demand, joint resolution July 22, 1876.

Coinage discontinued, act of February 19, 1887.

Total amount coined, $35,965,924.

HALF DOLLAR.

Authorized to be coined, act of April 2, 1792.

Weight, 208 grains; fineness, .892,4.

Weight changed, act of January 18, 1837, to $206\frac{1}{4}$ grains.

Fineness changed, act of January 18, 1837, to .900.

Weight changed, act of February 21, 1853, to 192 grains.

Weight changed, act of February 12, 1873, to $12\frac{1}{2}$ grams, or 192.9 grains.

Total amount coined to June 30, 1900, $144,988,509.

COLUMBIAN HALF DOLLAR.

Authorized to be coined, act of August 5, 1892.

Weight, 192.9 grains; fineness, .900.

Total amount coined, $2,501,052.50.

QUARTER DOLLAR.

Authorized to be coined, act of April 2, 1792.

Weight, 104 grains; fineness, .892,4.

Weight changed, act of January 18, 1837, to $103\frac{1}{8}$ grains.

Fineness changed, act of January 18, 1837, to .900.

Weight changed, act of February 21, 1853, to 96 grains.

Weight changed, act of February 12, 1873, to $6\frac{1}{4}$ grams, or 96.45 grains.

Total amount coined to June 30, 1900, $63,763,021.50.

COLUMBIAN QUARTER DOLLAR.

Authorized to be coined, act of March 3, 1893.

Weight, 96.45 grains; fineness, .900.

Total amount coined, $10,005.75.

TWENTY-CENT PIECE.

Authorized to be coined, act of March 3, 1875.

Weight, 5 grams, or 77.16 grains; fineness, .900.

Coinage discontinued, act of May 2, 1878.

Total amount coined, $271,000.

DIME.

Authorized to be coined, act of April 2, 1792.

Weight, 41.6 grains; fineness, .892,4.

Weight changed, act of January 18, 1837, to $41\frac{1}{4}$ grains.

Fineness changed, act of January 18, 1837, to .900.

Weight changed, act of February 21, 1853, to 38.4 grains.

Weight changed, act of February 12, 1873, to $2\frac{1}{2}$ grams, or 38.58 grains.

Total amount coined to June 30, 1900, $35,931,861.20.

HALF DIME.

Authorized to be coined, act of April 2, 1792.

Weight, 20.8 grains; fineness, .892,4.

Weight changed, act of January 18, 1837, to $20\frac{5}{8}$ grains.

Fineness changed, act of January 18, 1837, to .900.

Weight changed, act of February 21, 1853, to 19.2 grains.

Coinage discontinued, act of February 12, 1873.

Total amount coined, $4,880,219.40.

THREE-CENT PIECE.

Authorized to be coined, act of March 3, 1851.

Weight, $12\frac{3}{8}$ grains; fineness, .750.

Weight changed, act of March 3, 1853, to 11.52 grains.

Fineness changed, act of March 3, 1853, to .900.

Coinage discontinued, act of February 12, 1873.

Total amount coined, $1,282,087.20.

MINOR COINS.

FIVE CENT (NICKEL).

Authorized to be coined, act of May 16, 1866.

Weight, 77.16 grains; composed of 75 per cent copper and 25 per cent nickel.

Total amount coined to June 30, 1900, $17,967,308.10.

THREE CENT (NICKEL).

Authorized to be coined, act of March 3, 1865.

Weight, 30 grains; composed of 75 per cent copper and 25 per cent nickel.

Coinage discontinued, act of September 26, 1890.

Total amount coined, $941,349.48.

TWO CENT (BRONZE).

Authorized to be coined, act of April 22, 1864.

Weight, 96 grains; composed of 95 per cent copper and 5 per cent tin and zinc.

Coinage discontinued, act of February 12, 1873.

Total amount coined, $912,020.

CENT (COPPER).

Authorized to be coined, act of April 2, 1792.

Weight, 264 grains.

Weight changed, act of January 14, 1793, to 208 grains.

Weight changed by proclamation of the President, January 26, 1796, in conformity with act of March 3, 1795, to 168 grains.

Coinage discontinued, act of February 21, 1857.

Total amount coined, $1,562,887.44.

CENT (NICKEL).

Authorized to be coined, act of February 21, 1857.

Weight, 72 grains; composed of 88 per cent copper and 12 per cent nickel.

Coinage discontinued, act of April 22, 1864.

Total amount coined, $2,007,720.

CENT (BRONZE).

Coinage authorized, act of April 22, 1864.

Weight, 48 grains; composed of 95 per cent copper and 5 per cent tin and zinc.

Total amount coined to June 30, 1900, $10,072,758.59.

HALF CENT (COPPER).

Authorized to be coined, act of April 2, 1792.

Weight, 132 grains.

Weight changed, act of January 14, 1793, to 104 grains.

Weight changed by proclamation of the President, January 26, 1796, in conformity with act of March 3, 1795, to 84 grains.

Coinage discontinued, act of February 21, 1857.

Total amount coined, $39,926.11.

TOTAL COINAGES.

Gold	$2,167,088,113 00
Silver	796,171,133 55
Minor	33,503,969 72
Grand total	$2,996,763,216 27

THE STANDARD OF VALUE.

In providing for the coinage of the precious metals Congress established, by the act of April 2, 1792, the standard of value, consisting of certain gold and silver coins, at a ratio of 15 to 1 — that is to say, the value of an ounce of fine gold was in effect declared to be equal to the value of fifteen ounces of fine silver. A list of the coins authorized by the act of April 2, 1792, with their weights and fineness, will be found in another place. Both gold and silver coins were declared to be standards.

The ratio of 15 to 1 was adopted in pursuance of the investigations conducted by Alexander Hamilton, Secretary of the Treasury, who, in his report upon the subject, said that 15 to 1 was a near approximation to the commercial value of the two metals. It was soon discovered, however, that gold at the ratio of 15 to 1 was undervalued, and silver became practically the only metallic money available for use in the United States. In 1834 the ratio was changed to 16.002 to 1 and in 1837 it was changed to 15.988 to 1. That is the present ratio and is commonly called 16 to 1. By this change silver was undervalued and gold came into use in its place.

By the act of February 12, 1873, the coinage of the standard silver dollar was discontinued, and the gold dollar of 25.8 grains of standard gold, .900 fine, was declared to be the unit of value. The subsequent restoration of the coinage of silver dollars under the act of February 28, 1878, was on Government account and did not restore the silver dollar to its former place as a standard of value.

But while Congress provided for the so-called double or bimetallic standard, such double standard has never been effective in this country. From 1792 to 1834 silver was the metal by which all value were measured, and since 1834 gold has been, and still is, the sole actual standard.

COINS AND PAPER CURRENCY.

There are ten different kinds of money in circulation in the United States, namely, gold coins, standard silver dollars, subsidiary silver, gold certificates, silver certificates, Treasury notes issued under the act of July 14, 1890, United States notes (also called greenbacks and legal tenders), national bank notes, and nickel and bronze coins. These forms of money are all available as circulation. While they do not all possess the full legal-tender quality, each kind has such attributes as to give it currency. The status of each kind is as follows:

Gold coin is legal tender at its nominal or face value for all debts, public and private, when not below the standard weight and limit of tolerance prescribed by law; and when below such standard and limit of tolerance it is legal tender in proportion to its weight.

Standard silver dollars are legal tender at their nominal or face value in payment of all debts, public and private, without regard to the amount, except where otherwise expressly stipulated in the contract.

Subsidiary silver is legal tender for amounts not exceeding $10 in any one payment.

Treasury notes of the act of July 14, 1890, are legal tender for all debts, public and private, except where otherwise expressly stipulated in the contract.

United States notes are legal tender for all debts, public and private, except duties on imports and interest on the public debt.

Gold certificates, silver certificates, and national-bank notes are *not* legal tender, but both classes of certificates are receivable for all public dues, while national-bank notes are receivable for all public dues except duties on imports, and may be paid out by the Government for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt and in redemption of the national currency. All national banks are required by law to receive the notes of other national banks at par.

The minor coins of nickel and copper are legal tender to the extent of 25 cents.

GOLD COINS.

The coinage of legal-tender gold was authorized by the first coinage act passed by Congress, April 2, 1792.

The gold unit of value is the dollar, which contains 25.8 grains of standard gold .900 fine. The amount of fine gold in the dollar is 23.22 grains, and the remainder of the weight is an alloy of copper. While the gold dollar is the unit and standard of value, the actual coinage of the $1 piece was discontinued under authority of the act of September 26, 1890. Gold is now coined in denominations of $2.50, $5, $10, and $20, called respectively quarter eagles, half eagles, eagles, and double eagles.

The total coinage of gold by the mints of the United States from 1792 to June 30, 1900, is $2,167,088,113, of which it is estimated that $923,653,462 is now in existence as coin in the United States, while the remainder, $1,243,434,651, represents the excess of exports over imports and the amount consumed in the arts. The gold bullion now in the United States amounts to $112,378,182.56.

The basis for the estimate of the amount of gold coin in the United States was established in 1873, when the amount in the vaults of the national banks and in the Treasury was ascertained from reports to be $98,389,864. To this was added $20,000,000 as an estimate of the amount of gold in use on the Pacific Coast and $10,000,000 as the amount held by all other banks and by the people. The amount thus ascertained was $128,389,864, to which have been added from year to year the new coinage reported by the Director of the Mint, and the imports as shown by the custom-house reports, and from which have been deducted the exports and the amounts consumed in the arts. It will be seen that more than one-half of the gold coins struck at the mints of the United States have disappeared from circulation.

SILVER COINS.

The principal silver coin is the dollar, which contains $412\frac{1}{2}$ grains of standard silver .900 fine. The amount of fine silver in the dollar is $371\frac{1}{4}$ grains, and there are $41\frac{1}{4}$ grains of copper alloy. The standard silver dollar was first authorized by the act of April 2, 1792. Its weight was 416 grains .892.4 fine.

It contained the same quantity of fine silver as the present dollar, whose weight and fineness were established by the act of January 18, 1837. The coinage of the standard silver dollar was discontinued by the act of February 12, 1873, and it was restored by the act of February 28, 1878. The total amount coined from 1792 to 1873 was $8,031,238, and the amount coined from 1878 to June 30, 1900, was $498,496,215. The coinage ratio between gold and silver under the act of 1792 was 15 to 1, but by the acts of 1834 and 1837 it was changed first to 16.002 to 1 and finally to 15.988 to 1 (commonly called 16 to 1). This is the present ratio.

Of the 498,496,215 standard silver dollars coined since February, 1878, 1,725,000 are reported to have been shipped to Cuba, Porto Rico, and the Philippines; there were held in the Treasury June 30, 1900, $430,341,739, and the amount outside the Treasury in the United States was $66,429,476. Silver certificates to the amount of $408,499,347 are in circulation against that amount of the standard silver dollars held in the Treasury. Of the amount held in the Treasury $408,499,347 were held for the redemption of an equal amount of silver certificates in circulation; $6,153,153 were held on account of Treasury notes of 1890, and $15,689,229 were held in the general cash as assets of the Government. The commercial value of an ounce of fine silver June 30, 1900, was $0.61876, and the commercial value of the silver in the silver dollar on that date was 47.857 cents.

SUBSIDIARY SILVER.

The silver coins of smaller denominations than one dollar, authorized by the act of April 2, 1792, were half dollars, quarter dollars, dimes, and half dimes. They were the equivalent in value of the fractional parts of a dollar which they represented — that is, two half dollars were equal in weight to one silver dollar, and so on. These coins were full legal tender when of standard weight, and those of less than full weight were legal tender at value proportional to their respective weights.

By the act of February 21, 1853, the weight of the fractional silver coins was reduced so that the half dollar weighed only 192 grains, and all the smaller denominations were re-

duced in proportion. Their legal tender quality was at the same time limited to $5, and they thus became subsidiary coins. The present subsidiary coins are half dollars, quarter dollars and dimes. Their weight is slightly different from that prescribed by act of 1853; but the limit of their legal-tender quality has been raised to $10, and $117,845,395.85 have been coined since 1873.

The amount of full-weight fractional silver coined prior to 1853 was $76,734,964.50, and the amount of subsidiary silver coined since that year is $176,892,792.05.

There was a period, from 1862 to 1876, when there was no fractional silver coin in circulation in the United States except on the Pacific coast. During this period the small change of the country consisted of fractional paper currency, which will be described in its place.

ISSUE OF STANDARD SILVER DOLLARS AND SUBSIDIARY SILVER COIN.

Standard silver dollars are issued by the Treasurer and assistant treasurers in redemption of silver certificates and Treasury notes of 1890, and are sent by express, at the expense of the Government, in sums or multiples of $500, for silver certificates or Treasury notes of 1890 deposited with the Treasurer or any assistant treasurer.

Upon the deposit of an equivalent sum in United States currency or national-bank notes with the Treasurer or any assistant treasurer or national-bank depositary, subsidiary silver coin will be paid in any amount by the Treasurer or assistant treasurers in the cities where their several offices are, or will be sent by express, in sums of $200 or more, at the expense of the Government, or by registered mail, at the risk of the consignee, in packages of $50, registration free, from the most convenient Treasury office, to the order of the depositor. For this purpose drafts may be sent to the Treasurer or the assistant treasurer in New York, payable in their respective cities to the order of the officer to whom sent.

PAPER MONEY.

The first paper money ever issued by the Government of the United States was authorized by the acts of July 17 and August 5, 1861. The notes issued were called "demand

notes," because they were payable on demand at certain designated subtreasuries. They were receivable for all public dues, and the Secretary was authorized to reissue them when received; but the time within which such reissues might be made was limited to December 31, 1862. The amount authorized by these acts was $50,000,000. An additional issue of $10,000,000 was authorized by the act of February 12, 1862, and there were reissues amounting to $30,000. The demand notes were paid in gold when presented for redemption and they were received for all public dues, and these two qualities prevented their depreciation. All other United States notes were depreciated in value from 1862 until the resumption of specie payments, as shown by the table hereinafter following. The act of February 25, 1862, provided for the substitution of United States notes in place of the demand notes, and the latter were therefore canceled when received. By July 1, 1863, all except $3,770,000 had been retired, and nearly three millions of this small remainder were canceled during the next fiscal year. These notes were not legal tender when first issued, but they were afterwards made so by the act of March 17th, 1862.

UNITED STATES NOTES.

The principal issue of United States paper money was officially called United States notes. These were the well-known "greenbacks" or "legal tenders." The act of February 25, 1862, authorized the issue of $150,000,000, of which $50,000,000 were in lieu of an equal amount of demand notes, and could be issued only as the demand notes were canceled. A second issue of $150,000,000 was autherized by the act of July 11, 1862, of which, however, $50,000,000 was to be a temporary issue for the redemption of a debt known as the temporary loan. A third issue of $150,000,000 was authorized by the act of March 3, 1863. The total amount authorized, including the temporary issue, was $450,000,000, and the highest amount outstanding at any time was $449,338,902 on January 30, 1864. There are still outstanding $346,681,016.

The reduction from the original permanent issue of $400,000,000 to $346,681,016 was caused as follows: The act of April 12, 1866, provided that United States notes might be retired to the extent of $10,000,000 during the ensuing six

months, and that thereafter they might be retired at the rate of not more than $4,000,000 per month. This authority remained in force until it was suspended by the act of February 4, 1868. The authorized amount of reduction during this period was about $70,000,000, but the actual reduction was only about $44,000,000. No change was made in the volume of United States notes outstanding until after the panic of 1873, when, in response to popular demand, the Government reissued $26,000,000 of the canceled notes.

This brought the amount outstanding to $382,000,000, and is so remained until the resumption act of January 14, 1875, provided for its reduction to $300,000,000. The process was, however, again stopped by the act of May 31, 1878, which required the notes to be reissued when redeemed. At that time the amount outstanding was $346,681,016, which is the present amount. The amount of United States notes redeemed from the fund raised for resumption purposes since January 1, 1879, to June 30, 1900, was $564,147,369; but the volume outstanding is undiminished because of the provisions of the act of May 31, 1878, which require the notes so redeemed to be paid out again and kept in circulation.

The act of March 14, 1900, also directed the reissue of United States notes when redeemed, but they must first be exchanged for gold as provided in the said act. The act also provides that when silver certificates of large denominations are canceled and small denominations issued in their place, a like volume of small United States notes shall from time to to time be canceled and notes of $10 and upward issued in substitution therefor.

GOLD CERTIFICATES.

The act of March 3, 1863, authorized the Secretary of the Treasury to receive deposits of gold coin and bullion in sums not less than $20, and to issue certificates therefor in denominations not less than $20, said certificates to be receivable for duties on imports. Under this act deposits of gold were received and certificates issued until January 1, 1879, when the practice was discontinued by order of the Secretary of the Treasury. The purpose of the order was to prevent the holders of United States notes from presenting them for redemption

in gold, and redepositing the gold in exchange for gold certificates. No certificates were issued after January 1, 1879, until the passage of the bank act of July 12, 1882, which authorized and directed the Secretary of the Treasury to receive gold coin and bullion and issue certificates.

This act, however, provided that "the Secretary of the Treasury shall suspend the issue of gold certificates whenever the amount of gold coin and gold bullion in the Treasury, reserved for the redemption of United States notes, falls below one hundred millions of dollars." The act of March 14, 1900, re-enacted this provision, and further provided that the Secretary may, in his discretion, suspend such issue whenever and so long as the aggregate amount of United States notes and silver certificates in the general fund of the Treasury shall exceed $60,000,000. It provided further that of the amount of such certificates outstanding one-fourth, at least, shall be in denominations of $50 or less. The amount of gold certificates now outside the Treasury is $200,555,469. The act of July 12, 1882, made them receivable for customs, taxes, and all public dues.

SILVER CERTIFICATES.

The act of February 28, 1878, authorizing the issue of the standard silver dollars, provided that any holder of such dollars might deposit them in sums not less than $10 with the Treasurer or any assistant treasurer of the United States and receive certificates therefor, in denominations not less than $10, said certificates to be receivable for customs, taxes, and all public dues. The act of August 4, 1886, authorized the issue of the smaller denominations of $1, $2, and $5. Silver certificates have practically taken the place in circulation of the standard silver dollars which they represent. The amount outside the Treasury July 1, 1900, was $408,499,347, while the amount of standard silver dollars outside the Treasury was only $66,429,476. The act of March 14, 1900, provided that thereafter the issue of silver certificates should be limited to the denominations of $10 and under, except that 10 per cent of the total volume of such certificates, in the discretion of the Secretary of the Treasury, may be issued in denominations of $20, $50, and $100. Neither silver certificates nor silver dollars are redeemed in gold.

TREASURY NOTES, ACT OF JULY 14, 1890.

These notes were authorized by the act of July 14, 1890, commonly called the "Sherman Act." The Secretary of the Treasury was directed to purchase each month 4,500,000 ounces of fine silver at the market price, and to pay for the same with Treasury notes redeemable on demand in coin and legal tender for all debts, public and private, except where otherwise expressly stipulated in the contract. It was provided in the act that when the notes should be redeemed or received for dues thy might be reissued, but that no greater or less amount of such notes should be "outstanding at any time than the cost of the silver bullion and the standard silver dollars coined therefrom then held in the Treasury purchased by such notes."

The authority for the purchase of silver bullion under this act was repealed by the act of November 1, 1893, up to which date the Government had purchased 168,674,682.53 fine ounces at a cost of $155,931,002, for which Treasury notes were issued. The amount of silver bullion purchased under said act, and now held in the Treasury is 77,454,253.37 fine ounces, which cost $70,079,834.30. When coined it will produce $100,142,873, of which $30,063,639 will be gain, or seigniorage. The amount of Treasury notes reedemed in gold up to the close of the fiscal year 1900 was $106,556,655 and the amount redeemed in standard silver dollars was $70,703,410. Treasury notes redeemed in standard silver dollars are canceled and retired in accordance with the requirements of the act of 1890. Sections 5 and 8 of the act of March 14, 1900, also provide for the cancellation and retirement of Treasury notes to an amount equal to the coinage of standard silver dollars and subsidiary silver from the bullion purchased with such notes. The cancellation of notes on account of coinage since March 14, 1900, is $9,200,592, so that there remained outstanding June 30, 1900, but $76,027,000. Such notes redeemed in gold are reissued as required in the course of business.

Copies of the Treasury regulations governing the issue and redemption of currency can be procured by application to the Treasurer of the United States.

FRACTIONAL CURRENCY.

When specie payments were suspended about January 1, 1862, both gold and silver coins disappeared from circulation. The place of the subsidiary silver coins was for a time supplied by the use of tickets, duebills, and other forms of private obligations, which were issued by merchants, manufacturers, and others whose business required them to "make change." Congress soon interfered, and authorized, first, the use of postage stamps for change; second, a modified form of postage stamp called postal currency, and finally fractional paper currency in denominations corresponding to the subsidiary silver coins. The highest amount authorized was $50,000,000. The highest amount outstanding at any time was $49,102,660.27, and the amount still outstanding, though not in use as money, is $15,254,924.41, of which $8,375,934 is officially estimated to have been destroyed.

REDEMPTION.

Gold coins and *standard silver dollars*, being standard coins of the United States, are not "redeemable."

Subsidiary coins and *minor coins* may be presented, in sums or multiples of $20, to the Treasurer of the United States or to an assistant treasurer for redemption or exchange into lawful money.

United States notes are redeemable in United States gold coin in any amount by the Treasurer and all the assistant treasurers of the United States.

Treasury notes of 1890 are redeemable in United States gold coin in any amount by the Treasurer and all the assistant treasurers of the United States.

National-bank notes are redeemable in lawful money of the United States by the Treasurer, but not by the assistant treasurers. They are also redeemable at the bank of issue. In order to provide for the redemption of its notes when presented, every national bank is required by law to keep on deposit with the Treasurer a sum equal to 5 per cent of its circulation.

Gold certificates being receipts for gold coin, are redeemable in such coin by the Treasurer and all assistant treasurers of the United States.

Silver certificates are receipts for standard silver dollars deposited, and are redeemable in such dollars only.

"*Coin" obligations* of the Government are redeemed in gold coin when gold is demanded and in silver when silver is demanded.

AN ACT DIRECTING THE PURCHASE OF SILVER BULLION AND THE ISSUE OF TREASURY NOTES THEREON, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is hereby directed to purchase, from time to time, silver bullion to the aggregate amount of four million five hundred thousand ounces, or so much thereof as may be offered in each month, at the market price thereof, not exceeding one dollar for three hundred and seventy-one and twenty-five hundredths grains of pure silver, and to issue in payment for such purchases of silver bullion Treasury notes of the United States to be prepared by the Secretary of the Treasury, in such form and of such denominations, not less than one dollar nor more than one thousand dollars, as he may prescribe; and a sum sufficient to carry into effect the provisions of this act is hereby appropriated, out of any money in the Treasury not otherwise appropriated.

SEC 2. That the Treasury notes issued in accordance with the provisions of this act shall be redeemable on demand, in coin, at the Treasury of the United States, or at the office of any assistant treasurer of the United States, and when so redeemed may be reissued; but no greater or less amount of such notes shall be outstanding at any time than the cost of the silver bullion and the standard silver dollars coined therefrom, then held in the Treasury purchased by such notes; and such Treasury notes shall be a legal tender in payment of all debts, public and private, except where otherwise expressly stipulated in the contract, and shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; and such notes, when held by any national banking association, may be counted as a part of its lawful reserve. That upon demand of the holder of any of the Treasury notes herein provided for the Secretary of the Treasury shall, under such regulations as he

may prescribe, redeem such notes in gold or silver coin, at his discretion, it being the established policy of the United States to maintain the two metals on a parity with each other upon the present legal ratio, or such ratio as may be provided by law.

SEC. 3. That the Secretary of the Treasury shall each month coin two million ounces of the silver bullion purchased under the provisions of this act into standard silver dollars until the first day of July, eighteen hundred and ninety-one, and after that time he shall coin of the silver bullion purchased under the provisions of this act as much as may be necessary to provide for the redemption of the Treasury notes herein provided for, and any gain or seigniorage arising from such coinage shall be accounted for and paid into the Treasury.

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Approved, July 14, 1890.

MEANING OF 16 TO 1.

The phrase "16 to 1," as applied to coinage, means that the mint value of 16 ounces of silver shall be equal to the mint value of 1 ounce of gold: that is, that 16 ounces of silver shall be coinable into as many standard silver dollars as one ounce of gold is coinable into standard gold dollars.

STANDARD BULLION.

Standard bullion contains 900 parts of pure gold or pure silver and 100 parts of copper alloy. 20.67

The coining value of an ounce of pure gold is $20.67183, and the coining value of an ounce of standard gold is $18.60465.

The coining value in standard silver dollars of an ounce of pure silver is $1.2929, and the coining value of an ounce of standard silver is $1.1636.

WHAT IS SEIGNIORAGE.

This term, as used in the United States, means the profit arising from the coinage of bullion. The Government does not purchase gold bullion, but coins it on private account. There is no profit from the coinage of gold bullion, the face value of gold coins being the same as their bullion value, but at the present ratio of 16 to 1 the face value of the silver dollar is

greater than its bullion value; therefore when silver bullion is purchased and coined into dollars there is a profit arising from such coinage, the amount of which depends upon the price paid for the bullion. For example, there are $371\frac{1}{4}$ grains of pure silver in a dollar and there are 480 grains of pure silver in a fine ounce. The coinage value of a fine ounce is therefore \$1.2929—. If the fine ounce can be purchased for 70 cents, the profit of its coinage (the seigniorage) is \$0.5929—, and the profit on the $371\frac{1}{4}$ grains of pure silver in the single dollar is \$0.4586—, which is the difference between the actual cost of the bullion in the dollar and the nominal value of the coin.

The silver purchased by the Government is carried on the books of the Treasury at its actual cost, and the seigniorage is declared on the coinage of each month and paid into the Treasury.

COINAGE OF GOLD.

In the United States there is free and unlimited coinage of gold; that is, standard gold bullion may be deposited at the mints in any amount, to be coined for the benefit of the depositor, without charge for coinage; but when other than standard bullion is received for coinage a charge is made for parting, or for refining, or for copper alloy, as the case may be. Refining is the elimination from the bullion of all base metals. Parting is the separation of any silver which may be contained in the bullion. The charges for these operations vary according to the actual expenses. When copper is added for alloy, a charge of 2 cents per ounce is made for the amount actually added. The depositor receives in gold coin the full value of the gold in his bullion, less such charges as are indicated above.

The mints may lawfully refuse to receive gold bullion of less value than \$100, or when it is too base for coinage; but in practice deposits of gold bullion are accepted without regard to amounts, and rejected only when too base for coinage.

COINAGE OF SILVER.

Under existing law in the United States subsidiary silver and standard silver dollars are coined only on Government ac-

count. They are coined from bullion purchased by the Government, and the profits of such coinage belong to the Government. There is at present no authority for the purchase of bullion for the coinage of standard silver dollars, but, if necessary, sufficient bullion may be purchased to maintain the stock of subsidiary silver.

The Government is still coining standard silver dollars from the bullion purchased under the act of July 14, 1890. The amount of bullion on hand November 1, 1893, when the purchasing clause of that act was repealed, was 140,699,852.67 fine ounces, costing $126,758,280, the coining value of which was $181,914,961. Between November 1, 1893, and July 1, 1900, there were coined from this bullion 79,165,665 standard silver dollars, of which $54,853,083 represent the cost of the bullion coined and are held in the Treasury for the redemption of Treasury notes of 1890, while the remainder, $24,310,582, constitute the gain or seigniorage, and, being the property of the United States, has been paid into the Treasury, to be used like other available funds.

The seigniorage is an addition to the volume of money in the country, while the silver dollars representing the cost of the bullion are not, since they are paid out only in redemption of the Treasury notes of 1890, whereupon the latter are canceled and retired, as prescribed by the act of July 14, 1890.

The total expenditure by the United States for silver bullion, exclusive of subsidiary silver coinage, is:

Under act of February 28, 1878	$308,279,260 71
Under act of July 14, 1890	155,931,002 00
Total	$464,210,262 71

There have been coined from the bullion thus purchased standard silver dollars of the face value of $498,496,215, and there remain uncoined 77,454,253.37 fine ounces, which cost $70,079,834.30.

The present bullion value (July 1, 1900) of the standard silver dollars coined is	$238,566,424 07
And the present bullion value of the uncoined bullion is	47,925,593 82
Making a total bullion value of	$286,492,017 89

The space required for the storage of 1,000,000 standard silver dollars is 250 cubic feet. The standard silver dollars in the vaults of the Treasury and the several subtreasuries, June 30, 1900, amounting to about 430,000,000, require 107,500 cubic feet of space.

For other particulars respecting silver dollars and subsidiary silver, see pages 11, 12, and 13 and the coinage tables herein contained.

TRADE DOLLARS.

The trade dollar of 420 grains troy was authorized by the act of February 12, 1873. It was intended for circulation in oriental countries as a substitute for the Mexican dollar, which it slightly exceeded in weight; but by the terms of the authorizing act it was made legal tender in the United States in sums not exceeding $5.

This legal-tender quality was withdrawn by the joint resolution approved July 22, 1876, and the coinage was limited to such amount as the Secretary of the Treasury should consider sufficient to meet the export demand. The act of February 19, 1887, provided for the retirement of trade dollars and their recoinage into standard silver dollars or subsidiary silver. For six months after the passage of the act they could be exchanged at the Treasury or any subtreasury, dollar for dollar, for standard silver dollars or subsidiary coin.

The total number of trade dollars coined was 35,965,924. The number redeemed under the act of 1887, was 7,689,036, and from the bullion resulting from the melting of these dollars there were coined in subsidiary silver $2,668,674.30, and into standard silver dollars $5,078,472. Since the expiration of the period of redemption above mentioned, trade dollars have been purchased as bullion when presented at the mints.

FREE AND UNLIMITED COINAGE OF SILVER.

This term, as used at present in the discussion of the coinage question, means the right of any person to deposit standard silver bullion in any amount at the mints of the United States and have it coined at the expense of the Government, such depositor to receive in return for his bullion silver coins containing in the aggregate the same weight of fine silver as brought to the mint.

Any coinage under a future law would depend upon the terms of that law. (See "Coinage of gold.")

UNLIMITED COINAGE.

Coinage may be unlimited without being entirely free. It would be unlimited if any owner of bullion had the right to deposit it at the mint and have it converted into coins without any restrictions as to the amount.

WORLD'S STOCK OF GOLD AND SILVER COIN IN 1873 AND 1899.

The stock of gold and silver in the world in 1873 and 1899 is estimated to have been as follows:

	1873.	1899.
Gold	$3,045,000,000	$4,631,700,000
Silver	1,817,000,000	3,836,100,000

SALES OF GOLD.

During the period of the suspension of specie payments — January 1, 1862, to January 1, 1879 — the customs revenues of the Government were collected in gold. A sufficient amount of this gold was reserved to meet that portion of the interest on the public debt which was payable in coin, and the remainder was sold from time to time for currency at the market price by the several assistant treasurers of the United States, under instructions from the Secretary of the Treasury. The currency so obtained, with the currency collected from internal revenue and from other sources, was used to defray the ordinary expenses of the Government. The surplus, if any, was applied, as far as it would go, to the redemption of lawful-money obligations as they fell due, and after their maturity to the purchase of bonds at the market price.

The total amount of gold sold was $526,506,273.81, and the currency received therefor amounted to $633,334,089.67.

The average premium obtained was 20.3 per cent.

FOREIGN COINS NOT LEGAL TENDER.

Section 3584 of the Revised Statutes of the United States provides that no foreign coins shall be a legal tender in the United States.

DENOMINATIONS, WEIGHT, AND FINENESS OF THE COINS OF THE UNITED STATES.

GOLD.

Denomination.	Fine gold contained.	Alloy contained.[a]	Weight.
	Grains.	*Grains.*	*Grains.*
One dollar ($1)	23.22	2.58	25.80
Quarter eagle ($2.50)	58.05	6.45	64.50
Three dollars ($3)	69.66	7.74	77.40
Half eagle ($5)	116.10	12.90	129.00
Eagle ($10)	232.20	25.80	258.00
Double eagle ($20)	464.40	51.60	516.00

SILVER.

Denomination.	Fine silver contained.	Alloy contained.	Weight.
	Grains.	*Grains.*	*Grains.*
Standard dollar	371.25	41.25	412.50
Half dollar	173.61	19.29	192.90
Quarter dollar	86.805	9.645	96.45
Dime	34.722	3.858	38.58

Prior to the act of February 21, 1853, all silver coins were legal tender in all payments whatsoever. The act of February 21, 1853, reduced the weight of all silver coins of less denomination than the silver dollar about 7 per cent., to be coined on Government account only, and made them legal tender in payment of debts for all sums not exceeding $5.

MINOR.

Denomination.	Fine copper contained.	Alloy contained.	Weight.
	Grains.	*Grains.*	*Grains.*
Five cents [b]	57.87	19.29	77.16
One cent [c]	45.60	2.40	48

Troy weights are used, and while metric weights are by law assigned to the half and quarter dollar and dime, troy weights

[a] The alloy neither adds to nor detracts from the value of the coin.
[b] Seventy-five per cent copper, 25 per cent nickel.
[c] Ninety-five per cent copper, 5 per cent tin and zinc.

still continue to be employed, 15.432 grains being considered as the equivalent of a gram, agreeably to the act of July 28, 1866.

The weight of $1,000 in United States gold coin is 53.75 troy ounces, equivalent to 3.68 pounds avoirdupois. The weight of $1,000 in standard silver dollars is 859.375 troy ounces, equivalent to 58.92 pounds avoirdupois, and the weight of $1,000 in subsidiary silver is 803.75 troy ounces, equivalent to 55.11 pounds avoirdupois.

AUTHORITY FOR COINING, CHANGES IN WEIGHT AND FINENESS, AND AMOUNT COINED FOR EACH COIN.

Denomination.	Act authorizing coinage or change in weight or fineness.	Weight (grains).	Fineness.	Act discontinuing coinage.	Total amount coined to June 30, 1904.
GOLD COINS.					
Double eagle ($20)	March 3, 1849	516	.900	....	$1,850,281,960 00
Eagle ($10)	April 2, 1792	270	.916⅔	....	
	June 28, 1834	258	.899225	....	378,877,070 00
	Jan. 18, 1837	....	.900	....	
Half eagle ($5)	April 2, 1792	135	.916⅔	....	
	June 28, 1834	129	.899225	....	301,683,260 00
	Jan. 18, 1837	....	.900	....	
Quarter eagle ($2.50)	April 2, 1792	67.5	.916⅔	....	
	June 28, 1834	64.5	.899225	....	30,263,555 00
	Jan. 18, 1837	....	.900	....	
Three-dollar piece	Feb. 21, 1853	77.4	.900	Sept. 26, 1890	1,619,376 00
One dollar	March 3, 1849	25.8	.900	Sept. 26, 1890	19,499,337 00
One dollar, Louisiana Purchase-Exposition	June 28, 1902	25.8	.900	....	250,258 00
SILVER COINS.					
Dollar	April 2, 1792	416	.8924	....	*a* 8,031,238 00
	Jan. 18, 1837	412½	.900	Feb. 12, 1873	570,272,300 00
	Feb. 28, 1878	....	....	....	
	July 14, 1890	....	....	....	578,303,538 00
Trade dollar *b*	Feb. 12, 1873	420	.900	Feb. 19, 1887	35,965,924 00
Lafayette dollar	March 3, 1899	412½	.900	....	50,000 00
Half dollar	April 2, 1792	208	.8924	....	
	Jan. 18, 1837	206¼	.900	....	159,255,307 00
	Feb. 21, 1853	192	....	....	
	Feb. 12, 1873	*c* 192.9	....	....	
Columbian half dollar	Aug. 5, 1892	192.9	.900	....	*d* 2,500,000 00
Quarter dollar	April 2, 1792	104	.8924	....	
	Jan. 18, 1837	103⅛	.900	....	77,160,687 00
	Feb. 21, 1853	96	....	....	
	Feb. 12, 1873	*e* 96.45	....	....	
Columbian quarter dollar.	March 3, 1893	96.45	.900	....	*d* 10,000 00
Twenty-cent piece	March 3, 1875	*f* 77.16	.900	May 2, 1878	271,000 00
Dime	April 2, 1792	41.6	.8924	....	
	Jan. 18, 1837	41¼	.900	....	45,690,597 90
	Feb. 21, 1853	38.4	....	....	
	Feb. 12, 1873	*g* 38.58	....	....	
Half dime	April 2, 1792	20.8	.8924	....	
	Jan. 18, 1837	20⅝	.900	....	4,880,219 40
	Feb. 21, 1853	19.2	....	Feb. 12, 1873	
Three-cent piece	March 3, 1851	12⅜	.750	....	1,282,087 20
	March 3, 1853	11.52	.900	Feb. 12, 1873	
MINOR COINS.					
Five cent (nickel)	May 16, 1866	77.16	(*h*)	....	23,583,145 40
Three cent (nickel)	March 3, 1865	30	(*h*)	Sept. 26, 1890	941,349 48
Two cent (bronze)	April 22, 1864	96	(*i*)	Feb. 12, 1873	912,020 00
Cent (copper)	April 2, 1792	264	....	....	
	Jan. 14, 1793	208	....	....	1,562,887 44
	j Jan. 26, 1796	168	....	Feb. 21, 1857	
Cent (nickel)	Feb. 21, 1857	72	(*k*)	April 22, 1864	2,007,720 00
Cent (bronze)	April 22, 1864	48	(*i*)	....	13,143,544 77
Half cent (copper)	April 2, 1792	132	....	....	
	Jan. 14, 1793	104	....	....	39,926 11
	j Jan. 26, 1796	84	....	Feb. 21, 1857	

a Amount coined to February 12, 1873, $8,031,238. *b* Coinage limited to export demand, joint resolution July 22, 1876. *c* 12½ grams, or 192.9 grains. *d* Total amount coined. *e* 6¼ grams, or 96.45 grains. *f* 5 grams, or 77.16 grains. *g* 2½ grams, or 38.58 grains. *h* Composed of 75 per cent copper and 25 per cent nickel. *i* Composed of 95 per cent copper and 5 per cent tin and zinc. *j* By proclamation of the President, in conformity with act of March 3, 1795. *k* Composed of 88 per cent copper and 12 per cent nickel.

Total coinage.

Gold		$2,582,474,816 00
Silver dollars	$578,303,538	
Silver trade dollars	35,965,924	
		614,319,462 00
Silver subsidiary		291,049,898 50
Minor		42,190,593 20
Grand total		$3,530,034,769 70

STATEMENT OF THE COIN AND PAPER CIRCULATION OF THE UNITED STATES FROM 1860 TO 1904, INCLUSIVE, WITH AMOUNT OF CIRCULATION PER CAPITA.

RECAPITULATION.

Year.	Coin, including bullion in Treasury.	United States notes and bank notes.	Total money.	Coin bullion, and paper money in Treasury, as assets.	Circulation.	Population.	Circulation per capita.
1860	$235,000,000	$207,102,477	$442,102,477	$6,695,225	$435,407,252	31,443,321	$13.85
1861	250,000,000	202,005,767	452,005,767	3,600,000	448,405,767	32,064,000	13.98
1862	25,000,000	333,452,079	358,452,079	23,754,335	334,697,744	32,704,000	10.23
1863	25,000,000	649,867,283	674,867,283	79,473,245	595,394,038	33,365,000	17.84
1864	25,000,000	680,588,067	705,588,067	35,946,589	669,641,478	34,046,000	19.67
1865	25,000,000	745,129,755	770,129,755	55,426,760	714,702,995	34,748,000	20.57
1866	25,000,000	729,327,254	754,327,254	80,839,010	673,488,244	35,469,000	18.99
1867	25,000,000	703,200,612	728,200,612	66,208,543	661,992,069	36,211,000	18.28
1868	25,000,000	691,553,578	716,553,578	36,449,917	680,103,661	36,973,000	18.39
1869	25,000,000	690,351,180	715,351,180	50,898,289	664,452,891	37,756,000	17.60
1870	25,000,000	697,868,461	722,868,461	47,655,667	675,212,794	38,558,371	17.50
1871	25,000,000	716,812,174	741,812,174	25,923,169	715,889,005	39,555,000	18.10
1872	25,000,000	737,721,565	762,721,565	24,412,016	738,309,549	40,596,000	18.19
1873	25,000,000	749,445,610	774,445,610	22,563,801	751,881,809	41,667,000	18.04
1874	25,000,000	781,024,781	806,024,781	29,941,750	776,083,031	42,796,000	18.13
1875	25,000,000	773,273,509	798,273,509	44,171,562	754,101,947	43,951,000	17.16
1876	52,418,734	738,264,550	790,683,284	63,073,896	727,609,388	45,137,000	16.12
1877	65,837,506	697,216,341	763,053,847	40,738,964	722,314,883	46,353,000	15.58
1878	102,047,907	687,743,069	789,790,976	60,658,342	729,132,634	47,598,000	15.32
1879	357,268,178	676,372,713	1,033,640,891	215,009,098	818,631,793	48,866,000	16.75
1880	494,363,884	691,186,443	1,185,550,327	212,168,099	973,382,228	50,155,783	19.41
1881	647,868,682	701,723,691	1,349,592,373	235,354,254	1,114,238,119	51,316,000	21.71
1882	703,974,839	705,423,050	1,409,397'889	235,107,470	1,174,290,419	52,495,000	23.37
1883	769,740,048	702,754,297	1,472,494,345	242,188,649	1,230,305,696	53,693,000	22.91
1884	801,068,939	686,180,899	1,487,249,838	243,323,869	1,243,925,969	54,911,000	22.65
1885	872,175,823	665,257,727	1,537,433,550	244,864,935	1,292,568,615	56,148,000	23.02
1886	903,027,304	658,380,470	1,561,407,774	308,707,249	1,252,700,525	57,404,000	21.82
1887	1,007,513,901	625,898,804	1,633,412,705	315,873,562	1,317,539,143	58,680,000	22.45
1888	1,092,391,690	599,049,337	1,691,441,027	319,270,157	1,372,170,870	59,974,000	22.88
1889	1,100,612,434	558,059,979	1,658,672,413	278,310,764	1,380,361,649	61,289,000	22.52
1890	1,152,471,638	532,651,791	1,685,123,429	255,872,159	1,429 251,270	62,622,250	22.82
1891	1,112,956,637	564,837,407	1,677,794,044	180,353,337	1,497,440,707	63,947,000	23.42
1892	1,131,142,260	621,076,937	1,752,219,197	150,872,010	1,601,347,187	65,191,000	24.56
1893	1,066,223,357	672,585,115	1,738,808,472	142,107,227	1,596,701,245	66,456,000	24.03
1894	1,098,958,741	706,120,220	1,805,078,961	144,270,253	1,660,808,708	67,740,000	24.52
1895	1,114,899,106	704,460,451	1,819,359,557	217,391,084	1,601,968,473	69,043,000	23.20
1896	1,097,610,190	702,364,843	1,799,975,033	293,540,067	1,506,434,966	70,365,000	21.41
1897	1,213,780,289	692,216,330	1,905,996,619	265,787,100	1,640,209,519	71,704,000	22.87
1898	1,397,785,969	675,788,473	2,073,574,442	235,714,547	1,837,859,895	73,060,000	25.15
1899	1,508,543,738	681,550,167	2,190,093,905	286,022,024	1,904,071,881	74,433,000	25.58
1900	1,607,352,213	732,348,460	2,339,700,673	284,549,675	2,055,150,998	76,295,220	26.94
1901	1,734,861,774	748,206,203	2,483,067,977	307,760,015	2,175,307,962	77,754,000	27.98
1902	1,829,913,551	733,353,107	2,563,266,658	313,876,107	2,249,390,551	79,117,000	28.43
1903	1,905,116,321	779,594,666	2,684,710,987	317,018,818	2,367,692,169	80,487,000	29.42
1904	1,992,971,093	808,894,111	2,801,865,204	280,713 677	2,521,151,527	81,867,000	30.80

NOTE 1.—Specie payments were suspended from January 1, 1862, to January 1, 1879. During the greater part of that period gold and silver coins were not in circulation except on the Pacific coast where, it is estimated, the specie circulation was generally about $25,000,000. This estimated amount is the only coin included in the above statement from 1862 to 1875, inclusive.

NOTE 2.—In 1876 subsidiary silver again came into use, and is included in this statement, beginning with that year.

NOTE 3.—The coinage of standard silver dollars began in 1878, under the act of February 28, 1878.

NOTE 4.—Specie payments were resumed January 1, 1879, and all gold and silver coins, as well as gold and silver bullion in the Treasury, are included in this statement from and after that date.

NOTE 5.—This table represents the circulation of the United States as shown by the revised statements of the Treasury Department for June 30 of each of the years specified. See next page.

PRODUCT OF GOLD AND SILVER IN THE UNITED STATES FROM 1792 TO 1844, AND ANNUALLY SINCE.

[The estimate for 1792-1873 is by R. W. Raymond, Commissioner, and since by Director of the Mint.]

Year.	Gold.	Silver.	Total.
April 2, 1792-July 31, 1834	$14,000,000	Insignificant.	$14,000,000
July 31, 1834-December 31, 1844	7,500,000	$250,000	7,750,000
1845	1,008,327	50,000	1,058,000
1846	1,140,000	50,000	1,190,000
1847	889,000	50,000	939,000
1848	10,000,000	50,000	10,050,000
1849	40,000,000	50,000	40,050,000
1850	50,000,000	50,000	50,050,000
1851	55,000,000	50,000	55,050,000
1852	60,000,000	50,000	60,050,000
1853	65,000,000	50,000	65,050,000
1854	60,000,000	50,000	60,050,000
1855	55,000,000	50,000	55,050,000
1856	55,000,000	50,000	55,050,000
1857	55,000,000	50,000	55,050,000
1858	50,000,000	500,000	50,500,000
1859	50,000,000	100,000	50,100,000
1860	46,000,000	150,000	46,150,000
1861	43,000,000	2,000,000	45,000,000
1862	39,200,000	4,500,000	43,700,000
1863	40,000,000	8,500,000	48,500,000
1864	46,100,000	11,000,000	57,100,000
1865	53,225,000	11,250,000	64,475,000
1866	53,500,000	10,000,000	63,500,000
1867	51,725,000	13,500,000	65,225,000
1868	48,000,000	12,000,000	60,000,000
1869	49,500,000	12,000,000	61,500,000
1870	50,000,000	16,000,000	66,000,000
1871	43,500,000	23,000,000	66,500,000
1872	36,000,000	28,750,000	64,750,000
1873	36,000,000	35,750,000	71,750,000
1874	33,500,000	37,300,000	70,800,000
1875	33,400,000	31,700,000	65,100,000
1876	39,900,000	38,800,000	78,700,000
1877	46,900,000	39,800,000	86,700,000
1878	51,200,000	45,200,000	96,400,000
1879	38,900,000	40,800,000	79,700,000
1880	36,000,000	39,200,000	75,200,000
1881	34,700,000	43,000,000	77,700,000
1882	32,500,000	46,800,000	79,300,000
1883	30,000,000	46,200,000	76,200,000
1884	30,800,000	48,800,000	79,600,000
1885	31,800,000	51,600,000	83,400,000
1886	35,000,000	57,000,000	86,000,000
1887	33,000,000	53,350,000	86,350,000
1888	33,175,000	59,195,000	92,370,000
1889	32,800,000	64,646,000	97,446,000
1890	32,845,000	70,465,000	103,310,000
1891	33,175,000	75,417,000	108,592,000
1892	33,000,000	82,101,000	115,101,000
1893	35,955,000	77,576,000	113,531,000
1894	39,500,000	64,000,000	103,500,000
1895	46,610,000	72,051,000	118,661,000
1896	53,088,000	76,069,000	129,157,000
1897	57,363,000	69,637,000	127,000,000
1898	64,463,000	70,384,000	134,847,000
1899	71,053,000	70,807,000	141,860,000
1900	79,171,000	74,533,000	153,704,000
1901	78,667,000	71,388,000	150,055,000
1902	80,000,000	71,758,000	151,758,000
1903, approximate	74,428,900	73,076,100	147,505,000
Total	2,618,180,900	1,946,553,100	4,564,734,000

STATEMENT SHOWING THE PRINCIPAL OF THE PUBLIC DEBT, EXCLUSIVE OF GOLD, SILVER, AND CURRENCY CERTIFICATES AND TREASURY NOTES OF 1890, THE DECREASE AND INCREASE THEREIN AND PREMIUM PAID, FOR EACH ANNUAL PERIOD FROM MARCH 1, 1885, TO MARCH 1, 1904.

March 1—	Principal of debt, exclusive of certificates and Treasury notes.	Decrease.	Increase.	Premium paid.
1885	$1,541,527,867.93			
1886	1,530,284,465.03	$10,973,402.90		
1887	1,400,847,399.78	129,437,065.25		
1888	1,319,561,586.38	81,285,813.40		$2,852,015.88
1889	1,199,809,418.73	119,752,167.65		19,525,107.23
Total for four years		341,448,449.20		22,377,123.11
1890	1,090,514,608.23	109,294,810.50		19,688,510.58
1891	1,017,985,785.98	72,528,822.25		14,203,016.09
1892	972,282,890.61	45,702,895.37		
1893	963,281,752.63	9,001,137.98		
Total for four years		236,527,666.10		33,891,526.67
1894	1,007,356,015.43		$44,074,262.80	
1895	1,068,610,527.18		61,254,511.75	
1896	1,199,774,479.40		131,163,952.22	
1897	1,225,437,709.40		25,663,230.00	
Total for four years			a262,155,956.77	
1898	1,235,668,419.90		10,230,710.50	
1899	1,427,007,904.90		191,339,485.00	
1900	1,417,248,882.17	9,759,022.73		2,373,502.40
1901	1,385,934,653.17	31,314,229.00		43,582,004.59
		41,073,251.73	201,570,195.50	
Total for four years			b160,496,943.77	45,955,506.99
1902	1,329,917,918.64	56,016,734.58		14,426,927.34
1903	1,312,516,368.89	17,401,549.75		7,659,632.49
1904	1,291,103,139.39	21,413,229.50		5,962,649.91
Total for three years		94,831,513.78		28,049,209.74

aThe debt during the four-year period 1894 to 1897 was increased by sales of bonds		$262,315,400.00
By issue of 4 per cent bonds for interest on refunding certificates		15,290.00
By national-bank notes deposited in the Treasury in excess of redemptions thereof		817,883.25
		263,148,573.25
The debt during the same period was decreased by the redemption of bonds and other securities		992,616.48
Net increase for the period		262,155,956.77

bThe debt during the four-year period 1898 to 1901 was increased by sales of bonds under act of June 13, 1898, to meet expenditures of the war with Spain		198,792,640.00
By issue of 4 per cent bonds for interest on refunding certificates		7,970.00
By national-bank notes deposited in the Treasury in excess of redemptions thereof		5,901,282.50
		204,701,892.50
The debt during the same period was decreased—		
By bonds purchased	$19,300,650.00	
By bonds and other securities redeemed	24,904,298.73	
		44,204,948.73
Net increase for the period		160,496,943.77

PRINCIPAL OF THE PUBLIC DEBT AND INCREASE AND DECREASE THEREIN FROM 1865 TO 1904.

STATEMENT SHOWING THE PRINCIPAL OF THE PUBLIC DEBT, EXCLUSIVE OF GOLD, SILVER, AND CURRENCY CERTIFICATES AND TREASURY NOTES OF 1890, THE DECREASE AND INCREASE THEREIN, AND PREMIUM PAID, FOR EACH FISCAL YEAR FROM 1864 TO 1904, BOTH INCLUSIVE.

July 1—	Principal of debt, exclusive of certificates and Treasury notes.	Increase.	Decrease.	Premium paid.
1864	$1,815,784,370.57			
1865	2,680,647,869.74	$864,863,499.17		$1,717,900.11
1866	2,762,454,033.69	81,806,163.95		58,476.51
1867	2,659,358,323.87		$103,095,709.82	10,813,349.38
1868	2,594,009,211.19		65,349,112.68	7,001,151.04
1869	2,541,366,033.94		52,643,177.25	1,674,680.05
1870	2,432,125,307.81		109,240,726.13	15,996,555.60
1871	2,319,325,032.32		112,800,275.49	9,016,794.74
1872	2,207,165,028.78		112,160,003.54	6,958,266.76
1873	2,149,292,993.20		57,872,035.58	5,105,919.99
1874	2,156,105,368.43	6,812,375.23		1,395,073.55
1875	2,138,073,231.95		18,032,136.48	
1876	2,104,873,667.15		33,199,564.80	
1877	2,094,768,792.10		10,104,875.05	
1878	2,149,621,292.53	54,852,500.43		
1879	2,183,244,422.04	33,623,129.51		
1880	2,071,571,500.63		111,672,921.41	2,795,320.42
1881	1,986,139,119.58		85,432,381.05	1,061,248.78
1882	1,819,859,164.03		166,279,955.55	
1883	1,685,801,257.07		134,057,906.96	
1884	1,585,939,572.57		99,861,684.50	
1885	1,539,955,087.14		45,984,485.43	
1886	1,495,411,093.78		44,543,993.36	
1887	1,367,492,625.63		127,918,468.15	
1888	1,292,679,062.58		74,813,563.05	8,270,842.46
1889	1,171,419,624.23		121,259,438.35	17,292,362.65
1890	1,066,777,474.73		104,642,149.50	20,304,224.06
1891	1,005,806,560.61		60,970,914.12	10,401,220.61
1892	968,218,840.63		37,587,719.98	
1893	961,431,766.13		6,787,074.50	
1894	1,016,897,816.68	55,466,050.55		
1895	1,096,913,120.25	80,015,303.57		
1896	1,222,729,350.40	125,816,230.15		
1897	1,226,793,712.90	4,064,362.50		
1898	1,232,743,062.90	5,949,350.00		
1899	1,436,700,703.92	203,957,641.02		
1900	1,413,416,912.67		23,283,791.25	33,147,054.81
1901	1,371,572,244.89		41,844,667.78	14,649,572.95
1902	1,328,031,356.89		43,540,888.00	14,043,391.14
1903	1,309,405,912.89		18,625,444.00	10,907,119.82
1904	1,286,259,016.14		23,146,896.75	1,257,578.01

PRODUCTION OF GOLD AND SILVER IN THE

[From 1495 to 1885 is from a table of averages for certain periods, compiled by Dr. Adolph Soet-

	Period.	GOLD.			
		Annual average for period.		Total for period.	
		Fine ounces.	Value.	Fine ounces.	Value.
1	1493-1520	186,470	$3,855,000	5,221,160	$107,931,000
2	1521-1541	230,194	4,759,000	5,524,656	114,205,000
3	1545-1560	273,596	5,656,000	4,377,544	90,492,000
4	1561-1580	219,906	4,545,000	4,398,120	90,917,000
5	1581-1600	237,267	4,095,000	4,745,340	98,095,000
6	1601-1620	273,918	5,662,000	5,478,360	113,248,000
7	1621-1640	266,845	5,516,000	5,336,900	110,324,000
8	1641-1660	281,955	5,828,000	5,639,110	116,571,000
9	1661-1680	297,709	6,154,000	5,954,180	123,084,000
10	1681-1700	346,095	7,154,000	6,921,895	143,088,000
11	1701-1720	412,163	8,520,000	8,243,260	170,403,000
12	1721-1740	613,422	12,681,000	12,268,440	253,617,000
13	1741-1760	791,211	16,356,000	15,824,230	327,116,000
14	1761-1780	665,666	13,761,000	13,313,315	275,211,000
15	1781-1800	571,948	11,823,000	11,438,970	236,464,000
16	1801-1810	571,563	11,815,000	5,715,627	118,152,000
17	1811-1820	367,957	7,606,000	3,679,568	76,063,000
18	1821-1830	457,044	9,448,000	4,570,444	94,479,000
19	1831-1840	652,291	13,484,000	6,522,913	134,841 000
20	1841-1850	1,760,502	36,393,000	17,605,018	363,928,000
21	1851-1855	6,410,324	132,513,000	32,051,621	662,566,000
22	1856-1860	6,486,262	134,083,000	32,431,312	670,415,000
23	1861-1865	5,949,582	122,989,000	29,747,913	614,944,000
24	1866-1870	6,270,086	129,614,000	31,350,430	648,071,000
25	1871-1875	5,591,014	115,577,000	27,955,068	577,883,000
26	1876-1880	5,543,110	114,586,000	27,715,550	572,931,000
27	1881-1885	4,794,755	99,116,000	23,973,773	495,582,000
28	1886-1890	5,461,282	112,895,000	27,306,411	564,474,000
29	1891-1895	7,882,565	162,947,000	39,412,823	814,736,000
30	1896	9,783,914	202,251,600	9,783,914	202,251,600
31	1897	11,420,068	236,073,700	11,420,068	236,073,700
32	1898	13,877,806	286,879,700	13,877,806	286,879,700
33	1899	14,837,775	306,724,100	14,837,775	306,754,100
34	1900	12,315,135	254,576,300	12,315,135	254,576,300
35	1901	12,698,089	262,492,900	12,698,089	262,492,900
36	1902	14,313,660	295,889,600	14,313,660	295,889,600
	Total	....	....	513,970,398	10,624,712,900

Total production:
Gold, 1903, $325,527,200
Gold, 1904, 346,725,093

WORLD SINCE THE DISCOVERY OF AMERICA.

beer for the years 1886 to 1904, the production is the annual estimate of the Bureau of the Mint.]

SILVER.				PERCENTAGE OF PRODUCTION.				
Annual average for period.		Total for period.		By weight.		By value.		
Fine ounces.	Coining value.	Fine ounces.	Coining value.	Gold.	Silver.	Gold.	Silvr.	
1,511,050	$1,954,000	42,309,400	$54,703,000	11	89	66.4	33.6	1
2,899,930	3,740,000	69,598,320	89,986,000	7.4	92.6	55.9	4.1	2
10,017,940	12,952,000	160,287,040	207,240,000	2.7	97.3	30.4	69.6	3
9,628,925	12,450,000	192,578,500	248,990,000	2.2	97.8	26.7	73.3	4
13,467,635	17,413,000	269,352,700	348,254,000	1.7	98.3	22	78	5
13,596,235	17,579,000	271,924,700	351,579,000	2	98	24.4	75.6	6
12,654,240	16,361,000	253,084,800	327,221,000	2.1	97.9	25.2	74.8	7
11,776,545	15,226,000	235.530,900	304,525,000	2.3	97.7	27.1	72.3	8
10,834,550	14,008,000	216,691,000	280,166,000	2.7	97.3	30.5	69.5	9
10,992,085	14,212,000	219,841,700	284,240,000	3.1	96.9	33.5	66.5	10
11,432,540	14,781,000	228,650,800	295,629,000	3.5	96.5	36.5	63.4	11
13,863,080	17,924,000	277,261,600	358,480,000	4.2	95.8	41.4	58.6	12
17,140,612	22,162,000	342,812,235	443,232,000	4.4	95.6	42.5	57.5	13
20,985,591	27,133,000	419,711,820	542,658,000	3.1	96.9	33.7	66.3	14
28,261,779	36.540,000	565,235,580	730,810,000	2	98	24.4	75.6	15
28,746,922	37,168,000	287,469,225	371,677,000	1.9	98.1	24.1	75.9	16
17,385,755	22,479,000	173,857,555	224,780,000	2.1	97.9	25.3	74.7	17
14,807,004	19,144,000	148,070,040	194,444,000	3	97	33	67	18
19,175,867	24,703,000	191,758,675	247,930,000	3.3	96.7	35.2	64.8	19
25,090,342	32,440,000	250,903,422	324,400,000	6.6	93.4	52.9	47.1	20
28,488,597	36,824,000	142,442,986	184,169,000	18.4	81.6	78.3	21.7	21
29,095,428	37,618,000	145,477,142	188,092,000	18.2	81.8	78.1	21.9	22
35,401,972	45,772,000	177,009,862	228,861,000	14.4	85.6	72.9	27.1	23
43,051,583	55,663,000	215,257,914	278,313,000	12.7	87.3	70	30	24
63,317,014	81,864,000	316,585,069	409,322,000	8.1	91.9	58.5	41.5	25
78,775,602	101,851,000	393,878,009	509,256,000	6.6	93.4	53	47	26
92,003,944	118,955,000	460,019,722	594,773,000	5	95	45.5	54.5	27
108,911,431	140,815,000	544,557.155	704,074,000	4.8	95.2	44.5	55.5	28
157,581,331	203,742,000	787,906,656	1,018,708,000	4.8	95.2	44.4	55.6	29
157,001,370	203,069,200	157,061,370	203,069,200	5.9	94.1	49.9	50.1	30
160,421,082	207,413,000	160,421,012	207,413,000	6.7	93.3	53.2	46.8	31
169,035,253	218,576,800	169,055,253	218,576,800	7.6	92.4	56.8	43.2	32
168,337,453	217,648,200	168,337,453	217,648,200	8.1	96.9	58.5	41.5	33
173,591,364	224,441.200	173,591,364	224,441,200	6.6	93.4	53.2	46.8	34
173,011,283	223.691,300	173,011,283	223,691,300	6.8	93.2	54	46	35
165,955,639	215,861,800	166,955,639	215,861,800	7.9	92.1	57.8	42.2	36
....	....	9,168,497,971	11,854,213,500	5.3	94.7	47.3	52.7	

Silver, 1903, $220,371,600
Silver, 1904, 95,457,299 (commercial value).

STATEMENT SHOWING THE NET GOLD RESERVE AND NET CASH BALANCE IN THE TREASURY OF THE UNITED STATES AT THE END OF EACH MONTH FROM JANUARY, 1894.

Month.	Net gold reserve.	Net cash balance.	Total.
1894—January	$65,650,175	$18,431,925	$84,082,100
February	100,000,000	38,662,365	138,662,365
March	100,000,000	33,950,025	133,950,025
April	100,000,000	25,097,786	125,097,786
May	78,693,267	39,161,069	117,854,336
June	64,873,024	52,711,412	117,584,436
July	54,975,607	64,089,745	119,065,352
August	55,216,900	71,931,197	127,148,097
September	58,875,317	61,044,402	119,919,719
October	61,361,826	45,978,320	107,340,146
November	100,000,000	44,507,606	144,507,606
December	86,244,445	67,093,135	153,337,580
1895—January	44,705,967	99,897,337	144,603,304
February	87,085,511	91,112,075	178,197,586
March	90,643,307	97,273,954	187,917,261
April	91,247,144	89,570,772	180,817,916
May	99,151,408	86,218,692	185,370,100
June	100,000,000	95,240,154	195,240,154
July	100,000,000	87,149,531	187,149,531
August	100,000,000	84,039,156	184,039,156
September	92,911,973	92,493,390	185,405,363
October	92,943,179	87,004,819	179,947,998
November	79,333,966	98,072,421	177,406,387
December	63,262,268	114,764,933	178,027,201
1896—January	49,845,507	121,746,271	171,591,778
February	100,000,000	162,707,007	262,707,007
March	100,000,000	171,641,748	271,641,748
April	100,000,000	170,090,661	270,090,661
May	100,000,000	167,193,211	267,193,211
June	100,000,000	167,432,097	267,432,097
July	100,000,000	156,158,472	256,158,472
August	100,000,000	143,346,401	243,346,401
September	100,000,000	141,154,455	241,154,455
October	100,000,000	133,572,762	233,572,762
November	100,000,000	125,357,098	225,357,098
December	100,000,000	128,320,380	228,320,380
1897—January	100,000,000	115,362,421	215,362,421
February	100,000,000	112,837,256	212,837,256
March	100,000,000	122,045,606	222,045,606
April	100,000,000	128,090,517	228,090,517
May	100,000,000	130,113,813	230,113,813
June	100,000,000	140,137,627	240,137,627
July	100,000,000	133,016,457	233,016,457
August	100,000,000	118,561,207	218,561,207
September	100,000,000	115,192,787	215,192,787
October	100,000,000	107,756,100	207,756,100
November	100,000,000	120,663,560	220,663,560
December	100,000,000	135,474,769	235,474,769
1898—January	100,000,000	123,871,786	223,871,786
February	100,000,000	125,564,204	225,564,204
March	100,000,000	126,166,944	226,166,944
April	100,000,000	115,810,622	215,810,622
May	100,000,000	95,754,815	195,754,815
June	100,000,000	105,657,571	205,657,571
July	100,000,000	154,844,215	254,844,215
August	100,000,000	194,487,085	294,487,085
September	100,000,000	207,557,504	307,557,504
October	100,000,000	200,238,275	300,238,275
November	100,000,000	192,376,790	292,376,790
December	100,000,000	194,764,695	294,764,696

STATEMENT SHOWING THE NET GOLD RESERVE AND NET CASH BALANCE IN THE TREASURY OF THE UNITED STATES AT THE END OF EACH MONTH FROM JANUARY, 1894 — (*Continued*).

Month.	Net cash balance.	Net gold reserve.	Total.
1899—January	$100,000,000	$174,584,676	$274,584,676
February	100,000,000	169,103,513	269,103,513
March	100,000,000	184,043,164	284,043,164
April	100,000,000	163,127,533	263,127,533
May	100,000,000	167,584,094	267,584,094
June	100,000,000	181,380,469	281,380,469
July	100,000,000	174,844,167	274,844,167
August	100,000,000	179,352,873	279,352,872
September	100,000,000	187,695,613	287,695,613
October	100,000,000	189,391,540	289,391,540
November	100,000,000	186,216,440	286,216,440
December	100,000,000	183,595,453	283,595,453
1900—January	100,000,000	192,490,973	292,490,973
February	100,000,000	198,362,824	298,362,824
March	150,000,000	156,792,996	306,792,996
April	150,000,000	146,117,548	296,117,548
May	150,000,000	145,783,530	295,783,530
June	150,000,000	155,705,655	305,705,655
July	150,000,000	149,859,365	299,859,365
August	150,000,000	135,419,696	285,419,696
September	150,000,000	138,204,878	288,204,878
October	150,000,000	137,005,032	287,005,032
November	150,000,000	139,176,791	289,176,791
December	150,000,000	140,107,336	290,107,336
1901—January	150,000,000	143,012,973	293,012,973
February	150,000,000	148,915,149	298,915,149
March	150,000,000	158,443,522	308,443,522
April	150,000,000	156,494,208	306,494,208
May	150,000,000	162,338,469	312,338,469
June	150,000,000	176,833,125	326,833,125
July	150,000,000	177,368,877	327,368,877
August	150,000,000	179,971,356	329,971,356
September	150,000,000	169,919,880	319,919,880
October	150,000,000	175,655,697	325,655,697
November	150,000,000	167,010,665	317,010,665
December	150,000,000	171,603,279	321,603,279
1902—January	150,000,000	174,796,646	324,796,646
February	150,000,000	175,361,867	325,361,867
March	150,000,000	177,856,289	327,856,289
April	150,000,000	184,739,984	334,739,984
May	150,000,000	195,350,230	345,350,230
June	150,000,000	208,574,116	358,574,116
July	150,000,000	203,974,599	353,974,599
August	150,000,000	209,491,401	359,491,501
September	150,000,000	221,253,394	371,253,394
October	150,000,000	206,421,878	356,421,878
November	150,000,000	204,575,588	354,575,588
December	150,000,000	214,409,380	364,409,380
1903—January	150,000,000	218,345,963	368,345,963
February	150,000,000	224,543,470	374,543,470
March	150,000,000	222,921,989	372,921,989
April	150,000,000	223,326,187	373,326,187
May	150,000,000	225,168,898	375,168,898
June	150,000,000	234,394,276	384,394,276
July	150,000,000	228,291,444	378,291,444
August	150,000,000	233,450,711	383,450,711
September	150,000,000	239,417,184	389,417,184
October	150,000,000	228,637,403	378,637,403
November	150,000,000	219,237,430	369,237,430
December	150,000,000	229,374,895	379,374,895

STATEMENT SHOWING THE NET GOLD RESERVE AND NET CASH BALANCE IN THE TREASURY OF THE UNITED STATES AT THE END OF EACH MONTH FROM JANUARY, 1894 — (*Concluded*).

Month.	Net gold reserve.	Net cash balance.	Total.
1904—January	$150,000,000	$228,745,084	$378,745,084
February	150,000,000	223,068,506	373,068,506
March	150,000,000	224,699,996	374,699,996
April	150,000,000	220,919,188	370,919,188
May	150,000,000	163,287,516	313,287,516
June	150,000,000	169,027,242	319,027,242
July	150,000,000	154,081,580	304,081,580
August	150,000,000	147,975,364	297,975,364
September	150,000,000	151,414,163	301,414,163
October	150,000,000	146,352,797	296,352,797
November	150,000,000	143,344,658	293,344,658
December	150,000,000	146,592,689	296,592,689
1905—January	150,000,000	140,625,796	290,625,796
February	150,000,000	140,681,839	290,681,839
March	150,000,000	141,821,624	291,821,624
April	150,000,000	134,318,681	284,318,681
May	150,000,000	131,141,378	281,141,378

NOTE.—The gold reserve previous to March 14, 1900, was fixed at $100,000,000, since that date at $150,000,000.

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